# Petition

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

81-642

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

BANK OF MONTREAL
A Canadian corporation,
Petitioner-Plaintiff

vs

THORHALLUR G. OLAFSSON,
Respondent-Defendant

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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September 24, 1981

THE INLAND PRESS, DETROIT, MICHIGAN

## QUESTIONS PRESENTED

1. Should the centuries-old "voidness doctrine" adhered to by the courts below, as the basis for setting aside a final judgment over a year after its entry, be laid to rest?

2. Where over a year elapsed after final judgment from which no appeal was taken and where intervening rights by levy, execution and Marshal's Sale has vested title, and where a party moves for relief from judgment on grounds other than diversity and where two months later he amends his motion to include lack of subject matter jurisdiction, whether the court abused its discretion by reopening and setting aside the judgment as void for want of federal diversity-subject matter jurisdiction; and whether under such circumstances, that party was deprived of his property without due process of law under *Amendment V and XIV* of the United States Constitution?

3. Given the facts in 2 and in the record (App 21b, 22b, 23b) whether the courts below on a *Fed R Civ P. 60* (b) (4) and 60 (b) (6) procedural vehicle abuse their discretion by failing to pass on the question of Estoppel or to direct an evidentiary hearing thereon?

4. Did the district court abuse its discretion by making two inconsistent findings, viz: on the one hand, that he had reviewed the file (at the time of the entry of the judgment) heard the testimony and found all proceedings in the file to be in order, that Clerk's entry of default was entered and that the amount prayed for, is consistent with the applicable court rules and said he would sign Judgment; (App 1b) (which he did, App 2b, 3b) and on the other hand, 14 months after the entry of judgment stating, (Aug 15, 1979, (App 3b) ". . . here there never was attention directed to the jurisdictional issue until today's proceedings;" and on such finding making an Order Setting Aside Default Judgment and dismissing the case? (App 7b, 8b)

5. Whether the District Court without an evidentiary hearing, and on a bench hearing on Motion to Set Aside Judgment under procedural vehicle of *Fed R. Civ.* P. 60(b)(4-6) abused its discretion, making a conclusion that Petitioner, "knew or should have known" that Respondent was an alien (App 4b, par 7) and whether that was an adequate ground to warrant obtaining relief under Fed R. Civ P. 60(b)(4-6)?

* * *

## PARTIES TO PROCEEDINGS

BANK OF MONTREAL, A Canadian Corporation, Petitioner.

THORHALLUR G. OLAFSSON, Respondent

* * *

## CONSTITUTIONAL PROVISIONS AND RULES OF CIVIL PROCEDURE INVOLVED HEREIN

### ARTICLE III #2 U.S. Constitution

Section 2, Clause 1. Jurisdiction of Courts.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

### UNITED STATES CONSTITUTION
### Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces,

or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**AMENDMENT 14**

**Section 1. Citizens of the United States.**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**FEDERAL RULE OF CIVIL PROCEDURE**
**(60(b)(4), 60(b)(6))**

The Rule provides that on motion the district court, which rendered the judgment in the exercise of a sound discretion and upon just terms, may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (7 Moore's Federal Practice 2d ed. 396.

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule (59(b)).

(3) fraud (whether heretofore denominated intrinsic or extrinsic) misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment, should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment. Then goes on to provide: To motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

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THORHALLUR G. OLAFSSON,
Respondent-Defendant

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit rendered in these proceedings on 12th day of May, 1981 and on the Order denying Rehearing, dated, July 7, 1981.

* * *

### OPINIONS BELOW

The Opinion of the Court of Appeals, as yet unreported appears in the Appendix 8b through 11b and the Judgment thereon appears at Appendix 11b, 12b. The Order Denying Petition for Rehearing appears at Appendix 12b. The Opinion of the District Court appears at Appendix 3b through 7b and

the Order Setting Aside Default Judgment thereon appears at Appendix 7b, 8b. The Opinion of the United States District Court for the Eastern District of Michigan appears at F. Supp.

* * *

## CONCISE STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The Judgment of the Court of Appeals for the Sixth Circuit was entered on May 12, 1981 and the Order Denying Rehearing was entered on July 7, 1981. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under *28 U.S.C.* 1254 (1).

* * *

## REASONS FOR GRANTING WRIT

1. Whether the centuries-old "voidness doctrine" on subject matter jurisdiction, relied on by the courts below should be put to rest, for the reason that, except for rare cases of public policy, it has been replaced by the "doctrine of res judicata".

(a) There is a conflict in the decision of the United States Sixth Circuit Court of appeals and in a decision of the United States Tenth Court of appeals in cases strikingly similar. These are *Jordan* v. *Gilligan* 500 F2d 701 (6CA, 1974 cert denied 421 US 991 (1975) upon which courts below relied (10b-11b) and *In re Four Seasons Security Laws Litigation*, 502 F2d 834 (10CA) cert denied 419 US 1034. Both cases involved neglect and delay by Ohio Counsel and in both cases Ohio had both actual and constructive knowledge of the judgment and took no steps to object prior to judgment against Ohio's financial interest. In *Jordan* the District Court was held obligated to vacate because the judgment was "void", whereas in *Four Seasons* court was held to have abused its discretion in vacating despite a much lower degree of culpability on the part of counsel for Ohio than was evident in *Jordan*.

*(b)* There has been considerable disagreement among the federal Circuit courts of Appeal on the substantive issue under *Edelman* v. *Jordan*, 417 US 751 (1974) also relied on by the Sixth Circuit, (App 11b) and the position taken by the Sixth is a minority one.[1]

(c) The courts below in following the "voidness doctrine" decided a federal question which conflicts with the decisions of the U.S. Supreme Court and with the decisions of a majority of the federal court of appeals and thereby deprived Petitioner of the fundamental right to rely on the finality of its judgment and in so doing abused their discretion and deprived it of property without due process of law, in violation of Amendments V and XIV of the United States Constitution.

(d) The Decision below raises significant and reoccuring problems concerning granting of Motions to Vacate Judgments after appeal time has passed and after a party has acquired title to property by levy, execution and Marshal's Sale. A Substantial and controverted question is thus presented as to whether the vacation of final judgment is an abuse of discretion impairing a vested right and denying a party, specifically Petitioner herein, of its right to its property without due process of law, in violation of Amendments V and XIV of the United States Constitution.

(e) There is a great deal of confusion in the federal Circuit Courts of Appeals as to whether *Fed. R. Civ P. 60 (b)* (4) and *60 (b) (6)* are proper procedural vehicles to raise grounds for relief on attacks for voidness of final judgments.

(f) Whether the doctrine of "Estoppel" may be used as a bar to attacks on final judgments where no appeal has been taken and where the first action for relief is taken over a year after judgment's entry.

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[1]*See 87 Yale Law Review* 164, 1977 Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments, at page 221, footnote 270 for cases in accord and contra.

2. Should the Supreme Court exercise its Power of Supervision where the courts below have departed from the accepted and usual course of judicial proceedings and have sanctioned such departure, to the prejudice of Petitioner.

* * *

## CONCISE STATEMENT OF CASE

This case involves subject matter jurisdiction for lack of diversity, raised for the first time by a supplement to Motion to Set Aside a Default Judgment (App 48b, 49b) initially filed two months earlier on grounds other than diversity. (App 28b, 29b) Complaint was filed on March 2, 1978. Personal jurisdiction was obtained by service of summons and complaint. (For other background facts, see App 21b, 22b, 23b, 24b) (App 31b, par 4) Shortly after Respondent on March 28, 1978 filed an Assignment in Bankruptcy in Canada. (App 28b) Complaint, par 4 (App 26b) alleged complete diversity of citizenship between plaintiff and defendant. A Cover sheet in appropriate blocks indicated that the Petitioner was a Canadian corporation and Respondent was a citizen of the state (App 26b, 27b)[2] After taking proofs, Respondent having failed to appear, Default Judgment was entered on May 31, 1978.[3] (App 2b, 3b) On July 18, 1978 liens were filed on Respondent's property and a certified copy of Judgment was filed with the Oakland County Clerk, where the land was located, pursuant to *28 USC 1962* (notice to all that Petitioner had lien on property) (App 33b).

On June 7, 1979 Respondent filed his initial Motion to Set Aside Default Judgment. (App 28b, 29b, 30b) on two grounds (1) because he was never personally served with a copy of

[2]Petitioner's records, on which Complaint was based indicated Respondent was a citizen of the United States. (App 50b through 53b) Respondent was duly served with summons and complaint (App 31b, par 4) and shortly after, on March 28, 1978 filed an Assignment in Bankruptcy in Canada. (App 43b)

[3]On May 23, 1978 Notice of Hearing for taking of Default Judgment, to which a copy of proposed Judgment was attached, set for May 31, 1978, was sent to Respondent. (App 31b, 32b).

Complaint and because he had filed for bankruptcy in Canada on March 28, 1978 and under Canada law it was alleged to be illegal to pursue claims while bankruptcy was pending. (App 9b) Answer and denial of the allegations was filed by Petitioner. (App 30b through 34b and 37b through 44b) Respondent sought further relief from the District Court by Motion to strike the affidavit of the Canadian Trustee in Bankruptcy (referred to in footnote 4). The District Court did not pass on the grounds aforementioned nor on the Motion to Strike opting to rely solely on subject matter jurisdiction-diversity grounds. (App 6b, last par) and that the Default Judgment was entered ". . . in excess of the power of this court." (App 6b, par 3) The Appellate Per Curiam Panel adopted the same reasoning. (App 9b, last par 11b)

An Appeal from the District Court's Order Setting Aside Default Judgment and Order of Dismissal (App 7b, 8b) was duly taken and the United States Court of Appeals for the Sixth Circuit filed its Per Curiam Opinion on May 12, 1981 (App 8b through 11b) and Judgment was filed thereon on May 12, 1981 (App 11b, 12b) A Petition for Rehearing and Suggestion for In Banc Hearing was filed herein by Petitioner on May 26, 1981. (App 13b through 25b). The United States Court of Appeals for the Sixth Circuit on July 7, 1981 entered its Order Denying Petition for Rehearing. (App 12b)

In the Petition for Rehearing, supra, Petitioner responded to the finding of the Appellate Court, raised for the first time by it, without evidentiary hearing (App 11b 2nd par) "that the dispute between the parties can be more fairly and completely adjudged in the Canadian bankruptcy court. . . ." This in sum, would deprive Petitioner of the difference between $42,812.02 including costs and interest in U.S. funds, as compared to the sum of $24,955.00 at present rate of exchange. Additionally it

[4]See App 44b, 45b, and answer thereto 46b, 47b.

would reduce Petitioner from its present status as a secured creditor to that of a general creditor. (App 24b, 25b)

The question of Estopped and its failure to be reached by the courts below was raised in Petition for Rehearing. (App 25b)

* * *

**BASIS FOR REVIEW OF DISTRICT COURT**

The basis for Review of District Court's Order Setting Aside Default Judgment (App 7b, 8b) are the same reasons set forth in "Reasons for Granting Writ" which reasons are incorporated and made a part hereof by reference. (This Petition for Writ of Certiorari page 2).

* * *

**REASONS**

**1. WHETHER THE CENTURIES-OLD "VOIDNESS DOCTRINE" ON SUBJECT MATTER JURISDICTION RELIED ON BY THE COURTS BELOW SHOULD BE PUT TO REST, FOR THE REASON, THAT, EXCEPT FOR RARE CASES OF PUBLIC POLICY, IT HAS BEEN REPLACED BY THE "DOCTRINE OF RES JUDICATA."**

The courts below adhered to the "voidness Doctrine" on subject matter jurisdiction, relying (by Sixth Circuit Court of Appeals) on *Montalet, Jordan* and *Edelman*[5]; (App 10b, 11b) and district court; on *American Fire, Eisler* and *Misco.*[6] (App 5b-6b)

The "voidness doctrine" has entered its dotage and is now confined to forays in the name of public policy[7] and deserves no place in modern American Law.[8] The mechanical nature of the application of this doctrine provides ample evidence that it

[5]*Montalet* v. *Murray* 8 US (4 Cranch) 46 (1807); *Jordan* v. *Gilligan* 500 F2d 701 (6th Cir, 1974) cert den 421 US 911 (1975); *Edelman* v. *Jordan* 415 US (1974) 500 F2d, at 710).

[6]*American Fire and Casualty Company* v. *Finn*, 341 US 6; *Eisler* v. *Stritzler* 535 F2d page 148, 1976; and *Misco Leasing Inc* v. *Vaughn* 450 F2d 257 ca 10, 1971

[7]87 Yale Law Journal 164, 1977. Filling the Void: Judicial Power and Jurisdictional Attacks, on Judgments. (p 181).

[8]same at p's 164-5

fails to carry-out its goals but triggers inequities. "Such a doctrine deserves finally to be laid to rest."[9]

Almost every reason that history suggests to support the (voidness doctrine) has disappeared.[10]

Attached to this Petition for Writ of Certiorari is an Addenda cataloging authorities, on the one hand adhering to the "voidness doctrine" on subject matter jurisdiction, and on the other hand a listing of cases adhering to the modern doctrine of "res judicata-finality" doctrine. The latter category of cases establishes the principal that most judgments are not subject to attack for want of subject jurisdiction and that the link between subject matter jurisdiction and power has been crumbling.

The threshold question is whether the judgment herein is "void" for lack of subject-matter jurisdiction.

At the time the judgment herein was entered in the district court, that court made an express findings that it had jurisdiction to enter judgment; (App. 1b) and by signing the Judgment by Default on Application (App 2b, 3b) impliedly found it had jurisdiction to do so, otherwise the Judgment would not have been signed. The district court had jurisdiction to enter the judgment and it is valid for reasons hereinafter discussed under REASONS 1 (c) and 1 (d) pages 11-13 to which reference is asked.

The vintage "voidness doctrine" has been replaced by the modern "res-judicata-finality" (as to litigated issues) by *Davis*, *Stoll* and *Treinies*.[11] Those cases with *Chicot County*[12] each

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[9]same at 223.

[10]*40 N.C.L. Rev* 49 at p 78n5, Professor Dobbs, Decline of Jurisdiction by Consent.
*1 J Moore Federal Practice* 060 (4)a 2d ed., 610-11, 1974
*51 Minnesota Law Review*, Byond Bootstrap: Foreclosing the Issue of Subject Matter Jurisdiction before Final Judgment. at pages 491-2.

[11]*Davis* v. *Davis*, 305 US32 59 S St 3, 1938; *Stoll* v. *Gottlieb*, 305 US 165, 59 S Ct 134, 1938 at p. 172-175); *Treinies* v. *Sunshine Mining Co.*, 308 US 66, 60S Ct 44, 1939

[12]*Chicot County Drainage* v. *Baxter State Bank* 308 US 371, 1940 at page 378

rejected a substantial voidness based attack with sweeping fairness/finality language. Together these cases demolished, with one exception (Kalb)[13] the voidness doctrine as it had developed in the 19th century. In essence, the inquiry was to be shifted from the power vel non of the rendering court to the conduct of the parties before it.[14]

The concept of excess judicial power that was the foundation of "voidness doctrine" indicate that if the procedings in the original action complied with minimal due process — the right to a hearing, upon fair notice, before an impartial tribunal — then most questions of judicial power become less important than preserving the finality of Judgments.[15]

The Respondent was given a full and fair opportunity to defend this suit and to raise affirmative defense of bankruptcy and subject matter jurisdiction, but chose not to do so.[16]

If unappealed, and no appeal was taken here, the district court's decision is final and could not be attacked except by direct appeal.[17] It follows that a court vested with judicial power by its creating entity can never be said to have entered a judgment void for want of subject-matter jurisdiction. The district court simply did not act beyond its power as asserted by the district court that "the judgment (herein) was in excess of the power of this court." (App 6b, 3d par.) Such finding was an abuse of discretion, as being contrary to law, and had the effect of taking vested property of the Petitioner, and denying it due process of law under *Amendments V and XIV* of the United States Constitution. (ii herein)

* * *

[13]*Kalb* v. *Feuerstein* 308 US 343, 1940 (see 87 *Yale L.J.*, supra, at page 209-216)

[14]87 *Yale L.J.*, at page 174 (supra

[15]*Duke* v. *Durfee*, 308 F2d 209 (8 Cir, 1962) (rev'd 375 US 106, 1963, at p 111)

[16]App 31b, par, 4, 5, 7, 8, 32b; 36b, 37b, 39b through 44b.

[17]*Chicot County* supra at p 378; *Stoll* v. *Gottlieb* supra, at 175 *Gosa* v. Mayden, 413 US 665, 1972 (690-91).

**1(a) THERE IS A CONFLICT IN THE DECISION OF THE UNITED STATES SIXTH CIRCUIT COURT OF APPEALS AND IN A DECISION OF THE UNITED STATES TENTH COURT OF APPEALS.**

These cases are *Jordan*[18] relied on the court below (10b-11b) and *In re Four Seasons Security Laws Litigation*.[19] They are typical of the confusion and conflict triggered by the "voidness doctrine" and its progeny. Both cases involved neglect and delay by State of Ohio counsel and in both cases, State of Ohio had both actual and constructive knowledge of the judgment in the district courts and in neither case did Ohio take steps to object prior to judgment against Ohio's financial interest. In *Jordan* the district court was held obligated to vacate the judgment because the judgment was "void", whereas in *Four Seasons* the district court was held to have abused its discretion in vacating judgment, despite a much lower degree of culpability on the part of counsel for Ohio than was evident in *Jordan*.[20]

The two cases illustrate the fundamental inconsistency in allowing sovereign immunity to survive and defeat a final judgment.[21] As to holding of *Jordan* criticized.[22]

The proper resolution between finality and justice is not served by treating questions of jurisdiction as questions of power. Instead of keeping the "voidness doctrine" that permits diversion of discussions to questions of power, it is respectfully suggested that the courts should return to the principles enun-

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[18]*Jordan* v. *Gilligan* 500 F2d 701, (6ca, 1974, cert denied 421 US 991 (1975).

[19]*In re Four Seasons Security Laws Litigation*, 502 F2 834 (ca 10, cert denied 419 US 1034, 1974).

[20]87 Yale L.J. supra at page 221-222 (also footnote 269)

[21]87 *Yale L.J.* supra at 220 2nd par. (on holding of absolute lack of judicial power) also see: *Vecchione* v. *Wohlgemuth* 426 F Supp 1297 1309, 10, n 26, 1977 158 F2 150, p 159 n. 7 cert den 435 943 did not agree with *Jordan* to holding that all judgments are subject at all times to Rule 60(b)(4) assault because res judica does not apply, must disagree.

[22]87 *Yale L.J.* supra at top 219, through 221

ciated in *Stoll* v. *Gottlieb*,[23] *Chicot County Drainage District* v. *Baxter*[24] and *Durfee* v. *Duke*[25] and reject attacks on judgments on an asserted want of subject-matter jurisdiction in the rendering court.

The court below in relying on *Jordan* supra in affirming judgment of district court setting aside final judgment, abused its discretion as a matter of law and thereby deprived Petitioner of its property and denied to it due process of law in violation of *Amendments V and XIV* of the United States Constitution. (ii, herein)

* * *

**1 (b) THERE HAS BEEN CONSIDERABLE DISAGREEMENT AMONG THE FEDERAL CIRCUIT COURTS OF APPEAL ON THE SUBSTANTIVE ISSUE UNDER *EDELMAN V. JORDAN*, 417 US 731 (1954) RELIED ON BY THE SIXTH CIRCUIT, (App 11b) AND THE POSITION TAKEN IS A MINORITY ONE.**

The federal circuit courts of appeal disagree on the substantive issue under *Edelman* supra relative to the taxability of attorney's fees as costs in suits against states, or state officials. The position taken by the Sixth Circuit Court of Appeals is a minority one.[26]

The court below in relying on *Edelman*, supra on which it based *Jordan*, supra in support of its decision to vacate the default judgment herein, abused its discretion as a matter of law and thereby deprived Petitioner of its property and denied it due process of law in violation of *Amendments V and XIV* of the United States Constitution (ii herein)

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[23]*Stoll* v. *Gottlieb*, 305 U.S. 165, 59 S Ct 134, 172, 175, 1938

[24]*Chicot County Drainage District* v. *Baxter State Bank* 308 US 378 1940, p 378

[25]*Durfee* v. *Duke* 375 US 106, 1963, 113-14 & n. 12.

[26]See 87 Yale Law Review, supra at page 221, footnote 270 for cases in accord and Contra.

**1 (c) THE COURTS BELOW IN FOLLOWING THE "VOIDNESS DOCTRINE" DECIDED A FEDERAL QUESTION WHICH CONFLICTS WITH THE DECISIONS OF THE U.S. SUPREME COURT AND WITH THE DECISIONS OF A MAJORITY OF THE FEDERAL COURT OF APPEALS AND THEREBY DEPRIVED PETITIONER OF THE FUNDAMENTAL RIGHT TO RELY ON THE FINALITY OF ITS JUDGMENT AND IN SO DOING ABUSED THEIR DISCRETION AND DEPRIVED IT OF PROPERTY WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF *AMENDMENTS V AND XIV* OF THE UNITED STATES CONSTITUTION.**

The appellate court below posed the issue. (App 10b)[27] and held that *Article III* (2) (i) herein) was decisive on the issue, (App to p 9b) and relied on *Montalet*, *Jordan* and *Edelman* in support.[28] Grounds in REASON 1 (a) pages 9-10 are incorporated herein by reference.

While there is a sharp cleavage between the two principles of "voidness doctrine" and the "res judicata-finality" finality doctrine, the grounds in REASON 1 (a) p 9-10) supra and the collection of authorities of *ACCORD* and *CONTRA* cases clearly demonstrates that except for cases involving public policy or sovereign immunity,[29] the "voidness doctrine" is dead.

*Montalet*, supra[30] is a throw back to what the "voidness doctrine" was 174 years ago. Stare Decisis in vintage cases is not

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[27]"The competing values implicated in the decision are on the one hand the interest of finality of judgments and on the other hand the interest in maintaining federal constitutional jurisdictional limitations."

[28]See footnote 1 herein

[29]*Kalb*, supra, see footnote; 13 *United States* v. *United States Fidelity & Guaranty Co.* 309 U.S. 506, 1940, 514 Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments, *87 Yale L.J. 164*, (1977) at 216-219. As to *Jordan and Four Seasons* see footnote 18, 19 and discussion thereon p. 9-10 supra. (p. 20-23 herein)

[30]*Montalet* supra footnote 5 herein

sacrosanct. (17b) *Montalet* limited its dicta to those cases "where it did not appear on the record that the character of the original parties would support the jurisdiction . . . In the case here the record did support the jurisdiction at the time of the entry of the judgment. (Complaint, par 4, App 26b Cover sheet) App 27b) This matter was raised on direct appeal from the lower court and was still pending. As will be demonstrated in REASON 1 (d) p 13 courts take a different view while a case is "pending i.e. before final judgment or on timely appeal therefrom, as distinguished from Motions to set aside Judgments, where proceedings have been completed, judgment entered and no appeal taken.

The District Court relied on three cases, *American Fire*, *Eisler*, and *Nisco*,[31] (App 5b, 6b) and are inapposite for the reason that they are based on the dead "voidness doctrine" and additionally they involve appeals made directly from district court, while case was still "pending". Additionally *Misco* was not based on subject matter jurisdiction, but lack of proper service of process.

The court below in relying on the aforementioned cases to set aside final judgment herein abused their discretion as a matter of law and thereby deprived Petitioner of its property and denied it of due process of law in violation of *Amendments V and XIV of the* United States Constitution. (ii herein)

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[31]*American Fire & Casualty Co.* v. *Finn* 341 US 6 (14-16) 71 S Ct 534, 1950 but see (limited to cases where, either as stated in complaint or in posture at date of judgment, (p 16-19) This also was a direct appeal, on a "pending" case. (see p. 13-15 herein for different law in such case; also see *51 Minnesota Law Review* 491 508 footnote 30, 509; also *Vecchione* v. *Wohlgemuth* 426 F Supp; 558 F2d 150; cert den 434 US 943, 1977 (1308, referred to as a vintage case, in same category as *Montalet* supra at 1308.
*Eisler* v. *Stritzler* 535 F.2d 148 1976; this was also on direct appeal while case was still "pending".
*Miscoe Leasing Inc.* v. *Vaughn*, 450 F2d 257 10 ca, 1971 (This case involved lack of jur. re personal service)

**1 (d) THE DECISION BELOW RAISES SIGNIFICANT AND REOCCURING PROBLEMS CONCERNING GRANTING MOTIONS TO VACATE JUDGMENTS AFTER APPEAL TIME HAS PASSED AND AFTER A PARTY HAS ACQUIRED TITLE TO PROPERTY BY LEVY, EXECUTION AND MARSHAL'S SALE. A SUBSTANTIAL AND CONTROVERSIAL QUESTION IS THUS PRESENTED AS TO WHETHER THE VACATION OF FINAL JUDGMENT IS AN ABUSE OF DISCRETION IMPAIRING A VESTED RIGHT AND DENYING A PARTY, SPECIFICALLY PETITIONER HEREIN, OF ITS RIGHT TO ITS PROPERTY WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF *AMENDMENTS V AND XIV* OF THE UNITED STATES CONSTITUTION.**

The threshold consideration is to determine when a judgment is "void" since the concept of a void judgment is extremely limited[32] and need not be free from error.[33] Jurisdiction over subject matter is the power of the courts to deal with the class of cases in which it renders judgment and the federal district courts have such jurisdiction, i.e. the power to determine its jurisdiction.

Apart from the cases where the court's jurisdiction is as illustrated in *Jordan*[34] (held decisive by the court below, App 10b, 11b), while it is clear that existence of diversity citizenship is a

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[32]*Kansas City Southern Ry Co* v. *Great Lakes Carbon* 624 F2d 822 ca 1980 ft n. 5, cert den 101 S Ct 363.
*V.T.A. Inc.* v. *Airco Inc.* 597 F2d 220, 225, 10 ca 1979
*Black Leadership* v. *Cianci* 570 F2d 12, 15, 1978
*Ben Sager Chemicals* v. *Targosz & Co.* 560 F 2d 805, 812.7 ca, 1977
*Lubben* v. *Selective Serv Sys.* 453 F2d 645, 649 1st cir, 1972
*7 Moore* 60.25, 305, 6 (so narrowly restricted that a federal court judgment is almost never void because of lack of federal subject matter jurisdiction.

[33]*Engelbretson* v. *West* cca 8 1940, 111 F2d 528, cert den 311 US 663, 61 S Ct. 20
*Stoll* v. *Gottlieb* 305 US 165, 1938, n 35, 59 S Ct 134
*Treinies* v. *Sunshine Mining Co.*, 1939, 308 US 66 66 S. Ct 44, n 40.

[34]*Jordan* supra, see p's 9, 10, 11 herein

prerequisite to the jurisdiction of a federal case, it is equally clear that if the trial court determines that the jurisdictional requisites have been satisfied, such determination, even if demonstrably wrong, is not a nullity or truly void, it cannot be attacked collaterally.[35]

The district court directly (App 1) and by implication by entering the judgment herein (App 2b, 3b) found that it had jurisdiction. The judgment was not appealed and no action was taken on it for over one year, and then, initially, on grounds other than for subject matter jurisdiction-diversity.[36] The court file at date of taking judgment Petitioner had alleged facts to support the finding of the district court of subject matter-diversity.[37]

Initially filed on grounds other than diversity (p 4 herein) the Motion to Set Aside Judgment was later amended to set up lack of jurisdiction-diversity, fourteen months after entry of judgment. (see p from which no appeal was taken and after Petitioner had acquired vested rights, by levy, execution and Marshal's sale. (21b, 22b, 23b)

Except in rare cases involving public policy as hereinbefore shown, all the cases in the federal appellate courts involving dismissals upon a finding of lack of subject matter jurisdiction, involved motions filed prior to final judgment i.e. before the district court or while on direct appeal from that court within the time required for appeal.[38]

As heretofore shown (page 8 herein) Respondent had an ample opportunity to defend this case but chose not to do so. The judgment became final and could only be attacked on direct appeal from the district court within the appeal time. (see p 8 herein, note 17.)

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[35]see note 17 herein and note 39

[36]see 22b, par(f)

[37]see p 4 herein 1st par

[38]Rationale, *Independent Mortgage Trust* v. *White*, 446 F. Supp 120 Oregon, 1976 (123, 124) see other cases under n 39)

Under this REASON Petitioner relies on the Treatises and cases cited in *Addenda A* and specifically on the authorities below: [39]

By reason of the foregoing, the lower courts have abused their discretion as a matter of law and thereby deprived Petition of its property and denied it due process of law in violation of *Amendments V and XIV* of the United States Constitution. (ii herein)

* * *

**1 (e) THERE IS A GREAT DEAL OF CONFUSION IN THE FEDERAL CIRCUIT COURTS OF APPEALS AS TO WHETHER Fed, R. Civ P 60 (b) (4) and 60 (b) (6) ARE PROPER PROCEDURAL VEHICLES OF FINAL JUDGMENTS.**

The court below had some reservations as to whether Fed R.

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[39] *In Re Sawyer* 124 US 200 at page 221
*Ben Sager Chem* v. *Targosz* 560 F2d 805 7 ca, 1977
*Chicot County Drainage* v. *Baxter State Bank*, 308 US 371, 378, 1940
*Davis* v. *Davis* 305 US 32, 1938
*Duke* v. *Durfee* 308 F2, 8 ca 1972, rev'd 375 US 106, at p 111, 1972
*Des Moines Nav.* v. *Iowa* Homestead 123 US 52, 1887
*Four Seasons Securities Litigation* 502 F2d 834 10 ca 1034 cert den 419 US 1084, 1974
*Gosa* v. *Mayden* 413 US 665, 1973 (690, 691)
*Hartog* v. *Memory* 116 US 588
*Heiser* v. *Woodruff*, 327 US 726, 1945, 735
*Independence Mortgage Trust* v. *White* 446 F Supp 120, 1978, p 122 & 123
*Kansas City Southern Ry Co* v. *Great Lakes Carbon* 624 F2d 822, 825, 1980.
*Lubben* v. *Selective Service System* Bd 453 F2d 645 1ca, 1972, 649
*McCormick* v. *Sullivant* 10 Wheat 192 1825
*Noble* v. *Union River Logging Co.* 147 US 164, 174 (1893)
*Jackson* v. *Irving Trust Co.*, 311 US 494 1941
*Stoll* v. *Gottlieb* 305 U.S. 165, 1938 (1972, 175)
*Texas & Pac. RR Co* v. *Gulf* 270 US 266 (274) 1925
*Texlon Corporation* 596 F2 1092, 1979 (1100)
*Treinies* v. *Sunshine Mining Co.* 308 US 66 1939
*Vecchione* v. *Wohlegemuth* 426 F Supp 1297, 558 F2d 150 Ca 3 cert den 434 US 943, 1307-08
*Yanow* v. *Weyerhaeuser SS Co* 274 F 2d 277 9 ca 1958 cert den 362 US 919, p. 277
*Restatement of Judgments* #7, comment c
*Restatement of Judgments* 87 (e) Ch. 2 #7
87 *Yale Law Journal* 164 (at 175) and p's 20-23 *herein Addenda A*

Civ. P. 60 (b) (4) (P iii) provided grounds for the district court's action in setting aside the judgment herein, (App 10b) and opted to go on *Fed R. Civ P 60* (b) (6) (P iii) any other reason justifying relief). We will therefore limit our argument to that clause.

The court will intervene when the standards applied are unsupported or grossly misapplied.[40] Petitioner asserts that the standards herein were unsupported and grossly misapplied.

Petitioner acknowledges as stated by the court below that the finding of the district court is to be set aside only for abuse of discretion. (10b) The district court abused its discretion, by misapplying the law as herein before demonstrated.

The only ground upon which the lower courts relied was that Petitioner "knew or should have known" that Respondent was an alien. That is a fact which was exclusively within the knowledge of the Respondent. However, Respondent kept that a secret for 14 months after entry of judgment. (App 49b) Bank's records indicated that he was a U.S. citizen. (App 50b through 53b)

The finding of the court was without an evidentiary hearing, the Motion to vacate was a bench hearing. (9b 2nd par,) and there is nothing in the record to support that conclusion. As to the question of equities, from the record, of undisputed facts (App 21b through 25b) it clearly appears that the equities are all with Petitioner. The only reference to "equities" in the record is at (App 6b, bot page)[41]

This presents the problem as to whether this is an adequate excuse to bottom a *Rule 60 (b) (6)* attack on the validity of a judgment. Respondent offered no excuse, except that he gave the papers to the Canadian Trustee to take care of the suit. (App 30b, par 6), which was March 23rd 1978 or thereabouts.

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[40] *Universal Camera* 340 US 474

[41] ". . . the court is not unmindful of the equities of the bank and the actions taken; and resolves this matter solely . . . . on the basis of the strong policy relative to subject matter jurisdiction?

Trustee was the agent for the Creditors and not the agent of respondent. Trustee had no authority outside Canada. (App 30b to 34b). From at least August or September 1978 there was back of the scenes activity, engaged in by Respondent (App 21b, 22b, 23b) which clearly indicated he was aware of the judgment, but as noted in *Ackerman*[42] (where Petitioner in a *Rule 60 (b) (6)* hearing to set aside a default judgment) made a considered choice not to appeal.

*Fed Rule of Civ P.* 60 (b) (6) was intended to cover extraordinary situations.[43] In *Four Seasons* the appellate court held, in a Rule *60 (b) (6)* hearing that the district court abused its discretion in vacating judgment.

Having decided a point that is within its power to decide, as hereinbefore demonstrated that decision is valid even in erroneous. If not void then *Fed R Civ P.* 60 (b) may not authorize a post judgment attack. This has the backing of *Mine Workers.*[44]

Relief under Fed. R. Civ. P. 60b is not a substitute for appeal and should only succeed when the granting of relief would serve the interests of justice; and should not disregard the damaging impact of 60(b) relief upon the party who through litigation had obtained what appeared to be a final judgment, for the court is guided by equitable principles. The paraphrase *Ackerman*, supra Respondent made a considered choice, but chose not to (act). His choice was a risk, but calculated and deliberate and such as follows a free choice. (Respondent) cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not (to act) was probably wrong.[45]

For the above reasons the lower courts abused their discre-

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[42]*Hans Ackerman* v. *US* 349 US 193-205 1950, at page 198-99.

[43]*In re Four Seasons Securities* (see pgs. 9 and 10 herein n. 19 Also see *In re Texlon Corp* 506 F2d 1092, ca 2, 1979, at 1100.

[44]U.S. v. *Mine Workers*, 330 US 258 (1947)

[45]Vecchione v. *Wohlegemuth* 426 F Supp 1297, 558 F2d 150 Ca 3 cert den 435 US 943, 1977, at page 1311.

tion and thereby deprived Petitioner of its property and denied it of due process of law in violation of *Amendments V XIV* of the United States Constitution (ii).

* * *

**1(f) WHETHER THE DOCTRINE OF "ESTOPPEL" MAY BE USED AS A BAR TO ATTACKS ON FINAL JUDGMENTS WHERE NO APPEAL HAS BEEN TAKEN AND WHERE THE FIRST ACTION FOR RELIEF IS TAKEN OVER A YEAR AFTER JUDGMENT'S ENTRY.**

Petitioner concedes that ESTOPPEL may not be used to acquire jurisdiction of subject matter but asserts that, like res judicata, it may be used to bar a Rule 60 (b) (6) attack on final judgment. The facts upon which ESTOPPEL are based are at (App 21b, 22b) The court below allowed an attack under Fed R Civ P 60 (b) (6) but failed to pass on ESTOPPEL (App 35b). That in failing to pass on ESTOPPEL as a factor in a Rule 60 (b) (6) attack on the final judgment herein the courts below abused their discretion as a matter of law and thus denied to Petitioner of its property, (acquired through levy, execution and Marshal's sale. (App 33b, 34b, 35b, 36b) and denied to Petitioner due process of law in violation of Amendments V and XIV of the United States Constitution. (ii herein)[46]

**REASON 2. SHOULD THE SUPREME COURT EXERCISE ITS POWER OF SUPERVISION WHERE THE COURTS BELOW HAVE DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND HAVE SANCTIONED SUCH DEPARTURE, TO THE PREJUDICE OF PETITIONER.**

For the reasons heretofore documented in REASONS 1 (a), (b), (c), (d), (e) and (f) the courts below have departed from the accepted and usual course of judicial proceedings and have sanctioned such departure to the prejudice of Petitioner. Petitioner respectfully requests that the Supreme Court exercise its Power of Supervision.

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[46] *Iselin* v. *LaCoste* 147 F2d 791-795, 5 ca 1945; Cyclopedia of Federal Procedure #2450 at 152 (3rd Ed 1951-3 )

## CONCLUSION

For these reasons, a writ of certiorai should issue to review the Judgment of the District Court for the Eastern District of Michigan, Southern Division and the Judgment of the United States Court of Appeals for the Sixth Circuit, affirming the district court's judgment.

Respectfully submitted,

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September 23, 1981

## ADDENDA A

CONTRA: Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments 87 Yale Law Review 164, 1977 ("with growing emphasis on finality in this century ("voidness doctrine") has entered its dotage; it is now confined to occasional forays in the name of public Policy) (181) and "deserves no place in modern American Law. "The mechanical nature of the application of the voidness doctrine . . . provides persuasive evidence that the doctrine not only fails to achieve the goals it sets for itself, but also produces random inequities along the way, *Such a doctrine deserves* finally to be laid to rest. (emphasis supplied, (223).

*Professor Dobbs in Decline of Jurisdiction by Consent, 40 N.C.L. Rev. 49 at* p 78 n5 said: ". . . almost every reason that history suggests to support (voidness doctrine) has disappeared." 1 J. Moore Federal Practice 0.60 (4) a 2d ed, 610-11, 1974.

*51 Minn. L. Rev.* 491 (1967) (voidness doctrine raises grave doubts about judicial system) p 492-3; (re Mansfield-Hartog Rules, p 507-524)

*40 Columbia L. Rev* 1006, 1940 Boskey & Baucher Jur. and Collat. Attack. doctrine replaced by res judicata doctrine (as to litigated issues) by *Davis* v. *Davis*, 305 US 32 1938, *Stoll* v. *Gottlieb* 305 US 165, 1938) and *Treinies* v. *Sunshine Mining Co.*, 308 US 66, 1939, note 1940.

*16 U. Chicago L. Rev.* 86, 1948, p99 (doctrine can only be availed on Direct Appeal.)

*1 Moore Fed. Practice* 0.60 (4) at 610 2d ed (voidness doctrine raises grave doubts about judicial system)

*7 Moore 60.25 (2)* n 59 p307 (no presumption in favor of federal jurisdiction upon *direct* attack . . . their judgments are not subject to collateral attack for lack of federal jurisdiction — a quasi jurisdictional fact, see n. 51, 52, p305, 06); *7 Moore 60.19*, p 237-39, motion should succeed, only when relief would serve interests of justice.

*Restatement of Judgments #7* comment e ". . . action brought in federal court on ground of diversity of citizenship the judgment is not void although in fact there was not the necessary diversity of citizenship."

*Restatement of Judgments* #10 also id 4-8 (requisites of valid judgment) (balance rule)

*68 Dickinson L. Rev.* 39, Estoppel to Deny Federal Jurisdiction, 1963 (44) (unless a litigant makes a *direct attack on review*, he is forever bound thereby even though the court lacked jurisdiction.)

*53 Virginia Law Review* 1003, 1967 Validation of void judgments; The Bootstrap Principal p. 1003-04, (judgment ought to settle a dispute and rights and titles derived therefrom ought not to be tardily overturned;)

American Law Institute Study of the Division of Jurisdiction 366 (1969).

*Ackerman* v. *U.S.*, 340 U.S. 193 (1950).

*Beal Sec Dept. of Pub Welfare et al* v. *Vecchione et al*, 426 F. Supp 1297, 558 F2d 150, *cert den*, 434 U.S. 943 (1977).

*Ben Sager Chem.* v. *Targosz Co.*, 560 F.2d 805

*Bishop* v. *N.L.R.B.*, 502 F.2d 1024 (C.A. 5th Cir. 1974).

*Bridoux* v. *Eastern Airlines*, 214 F.2d 207, 210 (1954), *cert den*, 348 U.S. 821

*Burks* v. *Texas Co.*, 211 F.2d 443 (C.A. 5th Cir. 1954).

*Chicot County Drainage* v. *Baxter State Bank*, 308 U.S. 371, 378 (1940).

*Crosby* v. *Bradstreet Co.*, 312 F.2d 483 (C.A. 2nd Cir. 1963).

*Davis* v. *Davis*, 305 U.S. 32 (1938).

*Des Moines Nat Co.* v. *Iowa Homestead Co.*, 123 U.S. 52 (1887)

*DiFrischia* v. *New York Central R.R. Co.*, 279 F.2d 141 (3rd Cir. 1960).

*Dowell* v. *Applegate*, 152 U.S. 32 (1894).

*Duke* v. *Durfee*, 308 F2d 209 (8 cir, 1972 (rev'd 375 US 106, 1963 at p 111)

*Engelbretson* v. *West* cca 8, 1940 111 F2d, 311 US 663

*Duke Power Co.* v. *Carolina Environ Study*, 438 U.S. 75 (1978)

*Ex Parte Fisk*, 113 U.S. 713 (1885)

*In Re Four Seasons Securities Litigation*, 502 F.2d 834 (10th Cir.), *cert den*, 419 U.S. 1084 (1974).

*Gosa* v. *Mayden*, 413 U.S. 665 (1973)

*Grub* v. *Public Utilities Commission*, 281 U.S. 470, 479.

*Grubs* v. *General Electric*, 405 U.S. 699 (1972)

*Hart Steel Co.* v. *RR Supply Co.*, 1917 244 US 294, 299) 37 S Ct. 506

*Hartog* v. *Memory*, 116 U.S. 588

*Heiser* v. *Woodruff*, 327 U.S. 726

*Hoag* v. *Peterson*, 198 N.E. 2d 767 (1964)

*Independence Mortgage Trust* v. *White*, 446 F. Supp 120 (1978)

*Iselin et al* v. *La Coste*, 147 F.2d 791 (5th Cir. 1945).

*Jackson* v. *Irving Trust Co.*, 311 U.S. 494 (1941)

*Kalb* v. *Feuerstein*, 308 U.S. 343 (1940)

*Kenosha* v. *Bruno*, 412 U.S. 507 (1973)

*Kansas City Southern Ry. Co.* v. *Great Lakes Carbon*, 624 F.2d 822, 825 (1980)

*Klee* v. *Pittsburg & West Virginia R.R. Co.*, 22 F.R.D. 252 (Penn 1958)

*Kern* v. *Standard Oil Company*, 228 F.2d 699 (8th Cir. 1956).

*Transe Millins Co.*, 189 F.2d 546 (C.A. 3rd Cir. 1951).

*Kreiger* v. *Ryan Brothers Inc.*, 308 F. Supp 727 (Dist. Ct. Penns. 1970).

*Linkletter* v. *Walker*, 381 U.S. 618 (1965)

*Ledwith* v. *Storkan et al*, 2 F.R.D. 539 (Dist. Ct. Neb. 1942).

*Lee* v. *Navarro*, 597 F.2d 421 (1979)

*Lubben* v. *Selective Service System Bd.*, 453 F.2d 645 (1st Cir. 1972).

*McCormick* v. *Sullivant*, 10 Wheat 192 (1825)

*McSparran* v. *Weist*, 402 F.2d 867 (3rd Cir. 1968)

*Misco Leasing* v. *Vaughn*, 450 F.2d 257

*Naffe* v. *Union River Logging Co.*, 147 U.S. 164 (1893).

*Noble* v. *Union River Logging RR* 147 U.S. 165, 173-4 1893

*In Re Sawyer*, 124 U.S. 200 (1888) (221)

*Southern Pacific RR* v. *United States*, 1897 168 US 1, 49 18 S. CT-18

*Stoll* v. *Gottlieb*, 305 U.S. 165 (1938) (172-175)

*Swift & Co.* v. *U.S.*, 276 U.S. 311. 330.

*Texas & Pacific R.R. Co.* v. *Gulf*, 270 U.S. 266, 274

*Tozer* v. *Charles A. Krause Milling Co.*, 189 F.2d 242, 246 (C.A. 3rd Cir. 1951).

*Treines* v. *Sunshine Mining Co.*, 308 U.S. 66 (1939)

*In Re Texlon Corporation*, 596 F2d 1092 (C.A. 2d Cir. 1979)

*Thompson* v. *Witman*, 188 Wall 457

*Union Jt. Stock Land Bank* v. *Byu*, 310 U.S. 773 (1940)

*U.S.* v. *United Mine Workers*, 330 U.S. 258 (1947)

*United States Ind. Chem* v. *Carbide & Carbon*, 52 F. Supp 164 (D.C.N.Y. 1943)

*Universal Display etc* v. *Del Mar News*, 541 F.2d 142, 146 (1976)

*U.S.* v. *Bank of N.Y. & Tr. Co.*, 10 F. Supp 269, *aff'd*, 77 F.2d 866, *aff'd*, 296 U.S. 463

*United States* v. *Harahalis*, 205 F.2d 18 (C.A. 2d Cir. 1953)

*U.S. Ploydore* v. *Prince*, 19 F. Cas No 11, (C.D. Me. )

*Vecchione* v. *Wohlegemuth*, 426 F. Supp 1297, 558 F.2d 150 (C.A. 3rd Cir 1977), *cert den*, 435 U.S. 943

*Yanow* v. *Weyerhaeuser S.S. Co.*, 274 F.2d 277 (C.A. 9th Cir. 1958) *cert den.* 362 U.S. 919.

## ADDENDA B

ACCORD:

*American Fire & Cas. Co.* v. *Finn* 341 U.S. 6, 1951 (relied on by district court (App 5b)

*Basso* v. *Utah Power & Light Co.*, 495 F2d 906, 910-11, 10 ca, 1974

*Capron* v. *Van Noorden*, 6 U.S. (2 Cranch) 126, 1804

*Clark* v. *Paul Gray Inc.*, 306 U.S. 583 (1939)

*Edelman* v. *Jordan* 415 US 651, 1974) (see note under Jordan v. *Gilligan)*

*Eisler* v. *Stritzler* 534 F2d 148, 1976, lca, relied on by District Court (App 5b)

*Gilbert* v. *David* 235 US 561, 35 S Ct. 164, 1914.

*Jordan* v. *Gilligan* 500 F2d 701 (6 ca, 1974) cert den 421 U.S. 991 (1975) but see In Re Four Seasons Securities Litigation, 502 F2d, 834, ca, cert den 419 US 1034, 1974, facts similar, where in *Jordan* held obligated to vacate judgment where in *Four Seasons* district court held to have abused discretion in vacating judgment.

Three-judge panel in *Vecchione* v. *Wohlegemuth*, 426 F. Supp 1297, 1977 p. 1309 n 26, 559 F2d 558, 150, 149 n7, cert den 434 US 943, 1977, court disagreed with *Jordan*.

*Jordan* called a rare instance of usurpation of power under 11th Amendment of the US Constitution for atty's fees against state, and involving sovereign immunity, *Lubben* v. *Selective* 453 F2d 645 1st cir, 1972 at p. 649.

7 Moore Fed. Pr. 60.25 (2), page 306.

87 Yale L. Rev. 164, 1977, Filling the Void: Judicial Power and Jurisdictional attacks on Judgment 219 222 on *Jordan* and *Four Seasons* holding this to be example why "voidness doctrine" creates more problems than it resolves, and it should be laid to rest. (p. 222).

*Kalb* v. *Feurenstein* 308 US 433, 1939 (but see 87 Yale L. Rev. Supra, that principal as applied to *Kalb* was wrong at p-209-216).

*Louisville & N RR* v. *Mottley*, 211 US 149, 1908

*Mansfield C&L M Ry Co.* v. *Swan* 111 U.S. 379 4 S Ct. 519, 1884 (See 51 Minn. L. Rev. 490, 1967, Mansfield-Hartog Rules, p 507-524).

*Misco Leasing Inc.* v. *Vaughn* 450 F2d 257, 260) 10ca 1971 relied on by the District court (App 5b 6b) was a Rule 60 (b) (4) attack involving jurisdiction of the person, while holding a nullity it qualified by stating it was not asked whether under particular circumstances a movant may not be estopped from filing such a motion.

*Mitchell* v. *Maurer* 203 US 237 (1934)

*Montalet* v. *Murray* 8 US 4 Cranch 46 1807 relied on by court below (App 10b)

*Morris* v. *Gilmer* 129 US 315, 1889

*Old Wayne Mutual Life Association* v. *McDonough* 204 US 8

*Page* v. *Wright* 116 F2d 449 (452-3) 7 ca 1940

*Stigleder* v. *McQuesten* 198 US 141 25 S Ct 616

*Strawbridge et al* v. *Curtis* 3 Cranch 267

*United States* v. *Corrick* 298 US 435, 1936

*United States* v. *Griffin* 303 US 226, 1938

*Vallelley* v. *Northern Fire Ins. Co.* 254 US 348 (1920)

# Appendix

Office - Supreme Court, U.S.
FILED
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CLERK

81-642
NO.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

BANK OF MONTREAL,
a Canadian corporation,
Petitioner-Plaintiff,

vs.

THORHALLUR G. OLAFSSON,
Respondent-Defendant

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## APPENDIX

WILFRID L. BURKE
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BANK OF MONTREAL,
a Canadian corporation,

Plaintiff,

vs. No. 870482

THORHALLUR G. OLAFSSON,

Defendant

(Wednesday, May 31, 1978)
Filed August 2, 1979

OPINION OF DISTRICT COURT,
HONORABLE RALPH B. GUY, JR.
District Judge

(Transcript of Testimony of Witness in support of Application for Default Judgment deleted)

THE COURT: Very well, the court has reviewed the file in this matter and heard the testimony just given, finds all proceedings in the file to be in order, and finds that the Clerk's entry of default was entered in this matter on April 19, 1978, and that the amount prayed for, including the costs, is consistent with the applicable court rules; and, therefore, the court will sign a default judgment in the amount prayed for.

Do you have a judgment there?

MR. BURKE: I have presented that to your, your Honor.

THE COURT: Yes, I have it.

(The hearing in the within-entitled matter was thereupon concluded.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BANK OF MONTREAL,
a Canadian corporation,

Plaintiff,

vs. No. 870482

THORHALLUR G. OLAFSSON,

Defendant

Honorable Ralph B. Guy
District Judge
Filed May 31, 1978

## JUDGMENT BY DEFAULT UPON APPLICATION

In this action the Defendant, Thorhallur G. Olafsson, having been regularly served with the summons and complaint, and having failed to plead or otherwise defend, the legal time for pleading or otherwise defending haveing expired and the default of the said defendant, Thorhallur B. Olafsson in the premises having been duly entered according to law; upon the application of said plaintiff, judgment is hereby entered against said defendant in pursuant of the prayer of said complaint.

Wherefore, by virtue of the law and by reason of the premises aforesaid,

IT IS ORDERED, Adjudged and Decreed, that the plaintiff, Bank of Montreal, a Canadian Corporation, do have and recover from the defendant, Thorhallur G. Olafsson, the sum of Thirty-Four Thousand Four Hundred and 26/100 ($34,400.26) dollars, and additional interest thereon at the rate of six percent from the date hereof, till paid, together with said plaintiff's costs and disbursements incurred in this action amounting to

the sum of Thirty ($30.00) Dollars (filing fee and Marshal's fee for service) and that plaintiff have execution therefor.

RALPH B. GUY, JR.
District Judge
Judgment rendered May 31, 1978

(A True Copy)
HENRY R. HANSSEN, Clerk
By: Marilyn A. Evers, Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BANK OF MONTREAL,
a Canadian corporation,

Plaintiff,

vs. No. 870482

THORHALLUR G. OLAFSSON,

Defendant

Transcript of Opinion of August 15, 1979,
Filed November 23, 1979

OPINION OF HONORABLE RALPH B. GUY, JR.
DISTRICT JUDGE
(Argument of Counsel Omitted)
OPINION

THE COURT: The court has before it at at this time a motion to set aside a default judgment. The real chronology in this matter is as follows:

On March 2, 1978, a Civil Action No. 78-70482 was instituted in this court with the Bank of Montreal as the plaintiff and the defendant being one Thorhallur G. Olafsson.

Subsequent to that date, on May 31, 1978, no answer having been filed, the plaintiff came before this court and sought and received a default judgment in the amount of $34,400.26.

Subsequent to the entry of that default judgment, liens were filed against certain properties located in Oakland County, Michigan, and ultimately levy and execution was obtained in connnection with such property, and a certificate of sale by the Marshal was recorded with the Registrar of Deeds relating to a date of April 6, 1979.

Now, more than one year after the taking of the default judgment, the original defendant seeks to have this default judgment set aside.

In connection with these proceedings, this court makes the following factual findings:

First, that on the date that this suit was originally filed, on March 2, 1978, the plaintiff, Bank of Montreal, was a Canadian corporation, and was an alien insofar as the jurisdiction of this court is concerned.

Secondly, the court finds that the defendant, Thorhallur G. Olafsson, was a citizen of the County of Oakland and was involved, insofar as this litigation is concerned, in a contractual relationship — specifically a loan — which loan was executed within Canada and related to property that was located within Canada.

The court finds in that regard that Thorhallur G. Olafsson was not a citizen of the United States at the time this litigation was instituted; and, thus, also was an alien.

The court further finds that the plaintiff, Bank of Montreal, either knew or reasonably should have known of the citizenship of Thorhallur G. Olafsson.

The court finds thus that at the time this matter was before the court, the court had no subject matter jurisdiction pursuant to diversity of citizenship, as was claimed in the original complaint, since this was a matter between two aliens vesting no jurisdiction in this court.

The court thus further finds that the motion to set aside the default judgment should be granted, and does order that the default judgment be set aside.

The court would make the following additional observations.

First, there is no doubt that certain rights of the plaintiff have intervened as a result of the passage of time. They have taken certain steps pursuant to the granting of the original default judgment. Notwithstanding that, however, the court finds the policy strong as it relates to lack of subject matter jurisdiction, that that policy is overriding even in cases such as this where certain rights and actions of the plaintiff, relying on the default judgment, have intervened.

Typical of the United States Supreme Court's feelings in this regard in the case of *American Fire and Casualty Company* v *Finn*, 341 U.S., page 6.

The court further finds that the key cases relied upon by the plaintiff, Bank of Montreal, in support of their motion on this issue are distinguishable. The court is going to make no effort to distinguish all of the cases, but would make only the following comments. First of all, in regard to the case of *DiFrischia* v *New York Central Railroad Company*, the following comment was made relative to that case by the First Circuit Court of Appeals in *Eisler* v *Stritzler*, 535 F. 2d, page 148, a 1976 case, and I quote:

"*DiFrischia* v *New York Central Railroad Company* supra, stands almost alone as a challenger to the traditional Federal Court practice." I am now omitting part of the quote. And the court concludes by saying:

"We note that DiFrischia has not proved to be a particularly generative inroad on the traditional rule even in the Third Circuit." The Third Circuit being the circuit in which it was originally issued.

Insofar as the case of *Vecchione* v *Wohlgemuth*, reported at 426 F. Supp., is concerned, the quotes from that case are accurate, but they overlook a very significant footnote which reads as follows:

"Even *Misco Leasing, Inc.* v *Vaughn*, 450 F. 2d, 257, the case which defendants seem to cite for the proposition that a

judgment void when rendered is forever a nullity, qualified its observation with the following pronouncement: 'We are not asked to consider whether under any particular circumstances a movant under Rule 60 (b) may be estopped or precluded from filing such a motion.' Misco was, moreover, a case involving a 60 (b) (4) attack upon a default judgment raising a personal jurisdiction issue which no court had previously addressed in any form. We thus believe that our present determination is consistent with the theory espoused in Misco, for even if a 'void' judgment can be attacked under Rule 60 (b) (4) at any time, the attack will not be successful where, for instance, the jurisdictional issue has already been litigated and decided."

Here there never was attention directed to the jurisdictional issue until today's proceedings.

Accordingly, the court finds that pursuant to Rule 60 (b) (4) or Rule 60 (b) (6) the judgment that was entered was in excess of the power of this court; and, accordingly, the motion to vacate the default judgment is granted.

In this regard, the plaintiff in the second suit which is before this court, being Civil No. 79-71700, which effectively reverses the parties in the sense that Donna Olafsson, the wife of Thorhallur Olafsson, is the plaintiff in that case and the Bank of Montreal is the defendant, there is a representation that that case would be dismissed if this default judgment was set aside; and based upon that representation, the court finds it unnecessary to consider the other motions that are before it today. Therefore, the defendant in the earlier action and the plaintiff in the second later action having prevailed should present an appropriate order to the court consistent with its ruling today.

And the court is not unmindful of the equities of the bank excellent presentations.

And the court is not unmindufl of the equities of the bank and the actions taken; and resolves this matter solely as indicated on the basis of the strong policy relative to subject matter jurisdiction in the Federal Courts.

MR. PIERCE: Your Honor, one question.

Is the order to be submitted setting aside the default judgment, should that also include a dismissal of that case pursuant to the lack of jurisdiction?

THE COURT: The wording in effect would encompass that, since that was the premise. I think your point is well taken because it might leave a dangling question if that were not addressed.

MR. PIERCE: Thank you, your Honor.

(The hearing in the within-entitled matter was thereupon concluded.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BANK OF MONTREAL,
a Canadian corporation,

Plaintiff,

vs. No. 870482

THORHALLUR G. OLAFSSON,

Defendant

Filed: November 1, 1979

ORDER SETTING ASIDE DEFAULT JUDGMENT
AND
ORDER OF DISMISSAL

At a session of said Court held in the Federal Building and U.S. Courthouse, Detroit, Michigan on Nov. 1, 1979.

PRESENT: Honorable Ralph B. Guy Jr., District Court Judge.

This matter came on to be heard by the Court on October 31, 1979, upon Defendant's Motion for Entry of Order. The Court after hearing the oral arguments of counsel for the respective parties, reviewing the briefs filed by counsel for the respective parties, and otherwise fully advised in the premises, made findings of fact and conclusions of law on the record in

open court on August 15, 1979, upon Defendant's Motion to Set Aside and Dismiss. The Court having found that there was no jurisdiction to enter a Judgment against the Defendant and that the motion of Thorhallur G. Olafsson to Set Aside and Dismiss should be granted, NOW THEREFORE,

IT IS HEREBY ORDERED that the Default Judgment entered by this Court on May 31, 1978, against Thorhallur G. Olafsson be and hereby is set aside.

IT IS HEREBY FURTHER ORDERED that any and all liens, writs of levy and execution, and sheriff's sales filed or obtained by the Bank of Montreal pursuant to said Default Judgment be and hereby are set aside and held for naught.

IT IS HEREBY FURTHER ORDERED that the complaint filed by the Bank of Montreal in this action be dismissed.

RALPH B. GUY, JR.
U.S. District Judge

(A True Copy)
Clerk U.S. District Court
Eastern District of Michigan
By: Marilyn A. Evers
Deputy Clerk

No. 79-1672

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

BANK OF MONTREAL, Plaintiff-Appellant,
v.
THORHALLUR G. OLAFSSON, Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed May 12, 1981

Before: Engel and Merritt, Circuit Judges; Phillips, Senior Circuit Judge.

Per Curiam. The plaintiff is a Canadian corporation, and the defendant a citizen of Iceland. The issue here is whether the

trial court erred in setting aside a default judgment it had entered more than a year earlier. The ground for setting it aside was that it had no subject matter jurisdiction because the requisite diversity of citizenship was lacking.[1]

The Bank of Montreal filed suit March 2, 1978 against Thorhallur G. Olafsson to recover $34,572 due it through promissory notes and an overdraft. On May 31, 1978 the District Court granted a default judgment. The Bank then filed liens on Michigan realty held in the name of Olafsson's wife, and the property was sold to the Bank in satisfaction of its judgment. On June 7, 1979 Olafsson moved to set aside the judgment on two grounds: (1) because he was never personally served with a copy of the complaint, and (2) because he had filed for bankruptcy in Canada on March 28, 1978,[2] and under Canada law it is illegal to pursue claims while bankruptcy proceedings are pending.

In argument on the motion, Olafsson raised the diversity question. The district court rendered its opinion from the bench, finding that the bank was a Canadian corporation and that Olafsson was not a citizen of the United States either. It stated that the Bank knew or should have known of the citizenship of Olafsson. It recognized that the Bank had taken action in reliance on the default but found the policy against granting judgments in cases in which the court has no jurisdiction to be overriding. It noted that it had never before addressed the jurisdictional question and concluded that the default judgment should be vacated under Fed. R. Civ. P. 60(b)(4) or 60(b)(6) because it was entered "in excess of the power of this court." The court set aside the default judgment and "all liens, writs of levy and execution, and sheriff's sales," and dismissed the suit.

---

[1]The relevant clause of Article III limits federal jurisdiction by providing, "The judicial Power shall extend to all Cases . . . between Citizens of different States . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. art. III, §2.

[2]In that proceeding the Bank was named as a creditor.

The grant of motions made under rule 60(b) is a matter of discretion for the district court, and its decision is to be set aside only if it constitutes an abuse of discretion. Wright & Miller, Federal Practice and Procedure: Civil § 2872; 7 Moore's Federal Practice ¶ 60.19. The competing values implicated in the decision are on the one hand the interest in finality of judgments and on the other the interest in maintaining federal constitutional jurisdictional limitations.

Whether rule 60(b) (4) provides grounds for setting aside the judgment as void is arguable, but the district court's action is clearly allowable under rule 60(b)(6). The Restatement of Judgments § 7, Comment c, notes that an action brought in federal court on diversity grounds is not void though in fact diversity of citizenship does not exist. The idea, as expressed by Moore, is that when a court has jurisdiction over a class of case, its judgments on issues in the case, even if erroneous, are *res judicata*. He also notes that the "judgment of a federal court is not void, and hence is not subject to collateral attack on the ground that the rendering court lacked federal jurisdiction. . . ." 7 Moore's Federal Practice [60.25[2]]fi The present case, in which both parties are aliens rather than simply citizens of the same state, may present a slightly stronger case for voidness. *See Montalet* v *Murray*, 8 U.S. (4 Cranch) 46 (1807). The district court also relied on rule 60(b)(6), which allows for a weighing of equities, in setting aside the judgment. *See* Wright & Miller, § 2864; 7 Moore's ¶ 60.27[2]. It discounted the Bank's reliance interest because of its finding that the Bank "knew or reasonably should have known" of Olafsson's citizenship. Olafsson's stated reason for not responding to the Bank's suit was that he had forwarded the complaint to his bankruptcy trustee with the understanding that he would take care of it.

*In Jordan* v *Gilligan*, 500 F.2d 701 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975), this Court reversed the denial of a rule 60(b) motion filed eight months after an order was entered. The order granted attorneys' fees against the state of

Ohio. Against arguments that the decision was *res judicata*, the Court held that it was void, because "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court," *quoting Edelman* v *Jordan*, 415 U.S. 651 (1974). 500 F.2d at 710. The case establishes the proposition that constitutional jurisdictional limitations may justify relief from a judgment under rule 60(b).

Given the lack of federal jurisdiction in the case, and considering the equities of the case under rule 60(b), we agree with the district court that the default judgment should be set aside and the case dismissed for lack of subject matter jurisdiction. The dispute between the parties over the promissory notes, overdraft, and liens can be more fairly and completely adjudicated in the Canadian bankruptcy court, in the country where the loan was made, the bank is located and Olafsson's bankruptcy is pending.

Accordingly, the judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 79-1672

BANK OF MONTREAL,
Plaintiff-Appellant,

vs.

THORHALLUR G. OLAFSSON,
Defendant-Appellee

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Michigan

THIS CAUSE came on to be heard on the record from the

United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendant-Appellee recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

(A True Copy)
John P. Hehman
Clerk

No. 79-1672

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BANK OF MONTREAL,
Plaintiff-Appellant,

vs.

THORHALLUR G. OLAFSSON,
Defendant-Appellee

Filed July 7, 1981

ORDER DENYING PETITION FOR REHEARING

Before: Engel and Merritt, Circuit Judges, Phillips, Senior Circuit Judge.

A majority of the Court having not voted in favor of an en banc rehearing, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk.

No. 79-1672

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BANK OF MONTREAL,
Plaintiff-Appellant,

vs.

THORHALLUR G. OLAFSSON,
Defendant-Appellee

Filed May 26, 1981

On Appeal from the
United States District Court
Eastern District of Michigan

## PETITION FOR REHEARING AND SUGGESTION FOR IN BANC HEARING

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT:

I express a belief based on a reasoned and studied professional judgment, that the per curiam panel decision is contrary to the following decisions of the Supreme Court of the United States and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court:

*Chicot County Drainage Dist.* v *Baxter State B.* 308 U.S. 371 308 U.S. 371 (378) (1939).

*Gosa* v *Mayden* 413 U.S. 665 (691-2)

*Stott* v *Gottlieb* 305 U.S. 165 (175) 1938

*Ackerman* v *U.S.* 340 U.S. 193 (198) 1950

*Vechione* v *Wohlegemuth* 426 FS 1297, 558 F2d 150 3 ca cert den 435 U.S. 943 (at page 1311)

*Yanow* v *Weyerheuser Steamship Co.* 274 F2d 274 (277) 9 CA, 1959, Cert den 362 U.S. 919.

*Heiser* v *Woodruff* 327 U.S. 726 (735) 1945

*Hartog* v *Memory* 116 U.S. 588 (590) 1885

I express a belief, based on a reasoned and studied professional belief that this appeal involves one or more questions of exceptional importance:

1. Can a district court set aside its own final judgment and dismiss Plaintiff-Appellant's Complaint upon a showing make 14 months after entry of judgment, no appeal having been taken, on the claim that the court lacked subject jurisdiction.

2. Has a district court the power to find either expressly or impliedly whether it has subject matter jurisdiction in a case involving diversity of citizenship.

3. Given the facts in 1., is the policy of recognizing limited jurisdiction superior to the policy of favoring finality of judgments.

4. Is there a distinction in the Sixth Circuit between cases where question of subject matter jurisdiction is raised in the trial court or on direct appeal, as opposed to when subject matter jurisdiction is raised after final judgment and where the appeal time has expired.

Pursuant to the provisions of Rule 40 of the Federal Rules of Appellate Procedure, Petitioner, Bank of Montreal, Plaintiff-Appellant, herein respectfully petitions the judges of this honorable Court for a rehearing en banc in the above entitled cause. In support of this Petition, Petitioner shows the Court as follows:

1. The Honorable Judges overlooked or misapprehended the application of *Montalet* v *Murray*, 8 U.S. (4 Cranch) 46 (1807) to the facts in the captioned case, in that *Montalet* was a direct appeal from the trial court, as opposed to an appeal from a final judgment, where no appeal had been taken; and in overlooking that the original parties "were of record."

2. The Honorable Judges Overlooked or misapprehended the application of *Jordan* v *Gilligan*, 500 F2d 701 (6th Cir 1974) cert. den, 421 U.S. 991 (1975) (and the case of *Edelman* v *Jordan* (therein quoted) in that these cases are an exception to the standard rule, in that they involve application of the principles of sovereign immunity and usurpage of power, under the XI amendment.

3. The Honorable Judges overlooked or misapprehended the

application of two competing judicial policies in deciding the present question, that is the policy of recognizing on one hand of the limited jurisdiction of the federal courts and on the other hand of favoring finality of judgments.

4. The Honorable Judges overlooked or misapprehended that the trial judge had the power to determine his subject matter jurisdiction, and that he had found he had subject matter jurisdiction before the entry of default judgment.

5. The Honorable Judges overlooked or misapprehended trial judge's statement that the bank knew or should have known of Olafsson's citizenship, since there was no evidence in the record to support that.

6. The Honorable Judges overlooked or misapprehended that the rights of Bank could be fairly and completely adjudicated in the Canadian Bankruptcy.

7. The Honorable Judges overlooked or misapprehended question of Estoppel raised in Bank's Brief but not passed on by panel.

Wherefore, petitioner respectfully requests:

1. That a rehearing of the appeal in the above entitled cause be granted.

2. That the Honorable Judges of this Court order that the above entitled cause be heard by the court en banc.

Dated: May 22, 1981

Wilfrid L. Burke (P-11419)
Attorney for Petitioner
1303 Mutual Bldg., 28 W. Adams
Detroit MI 48226
(313) 961-6554

CERTIFICATE

As counsel for Bank of Montreal, Appellant, I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Wilfred L. Burke

## INTRODUCTION

(PLEASE NOTE: The pagination of Appendix references in the original are here shown as they are paginated in this Appendix)

This case involves subject matter jurisdiction for lack of diversity, raised for the first time by a supplement (App. 48b) to a Motion to Set Aside Default Judgment which had been entered by the trial court on May 31, 1978 (App. 2b-3b).

The original motion, filed June 7, 1978 (App. 28b-30b), to Set Aside Default Judgment was made, not on grounds of lack of diversity, but on two other grounds: (1) lack of personal service, and (2) that Defendant-Appellee had filed bankruptcy in Canada and under that law, it was claimed, that it was illegal to pursue claims while bankruptcy was pending (Per Curiam) (App. 9b) (answer and law refuting filed by Plaintiff-Appellant, see Reply Brief of Bank, pp 2, 3, 4-17).

It is the claim of the Plaintiff-Appellant that the trial court found it had subject matter jurisdiction to enter default judgment (App. 1b).

The Defendant-Appellant in the original Motion to Set Aside Default Judgment, in seeking relief, on grounds other than lack of diversity, acknowledged the trial court's subject matter jurisdiction. Further, a later Motion was filed to Strike Trustee's Affidavit, dated and filed July 2, 1979, in seeking the trial Court's relief therefor, acknowledged the trial court's subject matter jurisdiction.

It is the claim therefore, that Defendant-Appellant is estopped from raising the issue of lack of subject matter jurisdiction. (Plaintiff-Appellant's Appellate Brief, p. 18).

ESTOPPEL WAS NOT REACHED IN THE PER CURIAM DECISION HEREIN.

The Supplement (App. 48b) first raising the question of lack of diversity was filed August sic August 2, 1979 29 1979, fourteen months after the Default Judgment had become final and from which no appeal was taken and after Bank had acquired intervening rights by filing liens, levy (App. 33b) and acquiring

title by Certificate of Sale, after judicial sale, and publication and posting notice of sale (App. 34b-35b).

Bank respectfully submits that this case involves too many fundamental and unsettled issues in various federal circuits, to be disposed of by summary per curiam affirmance. The Sixth Circuit in *Jordan* v *Gilligan*, 500 F2d, 701, 708-9, (6th Cir, 1974, cert den. 421.U.991, (1975) made the following observation re per curiam affirmances:

> "While per curiam affirmances by the Supreme Court have been held to be binding precedents in later cases in lower courts, they have so frequently proved to be such a shaky guide to the outcome of later fulldress considerations, that in many decisions in the district court and courts of appeals they have received but scant attention 1B *J. Moore Federal Practice* #0.402 (2) (1973 Supp at pp 13-14).

Bank respectfully submits that this case is deserving of fulldress consideration by the full bench of the Sixth Circuit.

Stare Decisis in vintage cases as in *Montalet*, is not sacrosanct. There must be room for progress in the law. The net is not so finely drawn that it strangles progress, fairness and justice.

As applied to the Constitution it is said:

> "A constitution which will not bend will sooner or later break."

*John Salmond, Jurisprudence* (5th Ed.) 473

Put another way:

> "The law must be stable, but it must not stand still."

*Roscoe Pound, Introduction to the Philosophy of Law*. 1922

The United States Supreme Court in *Gosa* v. *Mayden*, 413 U.S. 665 (1972) "firmly rejected the idea that all new interpretations of the Constitution must be considered always to have been the law and that prior constructions must always be ignored." (At page 675)

* * *

Since the Per Curiam opinion was not detailed, the following points summarized by the Honorable Judges, require clarification:

The Honorable Judges of the Per Curiam panel bottomed their decision on the following points:

1. They relied on *Montalet* v. *Murray* 8 U.S. (4 Cranch) 8. U.S. 46 (1807).

2. They relied on *Jordan* v. *Gilligan* 500 F2d 701 (6th CA, 1974) quoting *Edelman* v. *Jordan* 415 U.S. 651 (1974) (500 F2d at 710).

3. They relied on the statement of the trial judge that the jurisdiction question had never before (bench hearing, August 15, 1979) been addressed. (in this case) and should be vacated under *Fed. R. Civ.* P. 60 (b) (4) of 60 (b) (6) because it was entered "in excess of the power of the court." (Per Curiam, App. 13).

4. They relied on the statement of the trial judge, that the "bank knew or should have known of the citizenship of Olafsson . . ." (Per Curiam App. 13).

5. They found that the dispute between the parties could be more fairly and completely adjudicated in the Canadian bankruptcy.

* * *

As to the first point. *Montalet* is 174 years old. In that vintage case the following appeared:

> "Marshall, Ch. J. said that if it did not appear upon the record, that the character of the original parties would support the jurisdiction, that objection was equally fatal, under the uniform decisions of this court."

In this case the "character of the original parties would support the jurisdiction . . ." because that appeared of record. (App. 32, 33, 34, 58, 59) Further *Montalet* was a direct appeal from the lower court.

* * *

2. *Jordan* v. *Gilligan* 500 F2d 701, 6 ca, cert den 421 U.S.

991, 1975, quoting *Edelman* v. *Jordan* 415 U.S. 651, (1974) 500 F2d 710. Neither of these cases involved the question of diversity of citizenship, but are in a unique and rare class which imbodied the doctrine of soverign immunity and usurpation of power by a court. That class of case is an exception to the standard rule.

*Jordan* was an appeal from a judgment for attorney's fees awarded against the state of Ohio by Motion to Vacate judgment on the claim that the award was void for lack of jurisdiction under the Eleventh Amendment of the Constitution which provided states immunity from suit.

The court's decision invoked and came under analysis of the court in *Independent Mortgage Trust* v *White* 446 F. Supp 120 (1976): (at page 123-4)

> "(3) A judgment is void and thus subject to collateral attack, or to vacation under *Fed. R. Civ. P* when the finding by the district court of subject matter jurisdiction is a 'rare instance of a clear usurpation of power.' *Lubben* v *Selective Service System* 453 F2d 645, 649 (1st circuit, 1972) Such a usurpation occurs when a court purports to act beyond its competency, that is when it acts in a type of case not within its power. See *Restatement*, Judgments #7 (1942) AN APPARENT EXAMPLE OF SUCH USURPATION" OCCURRED IN *Jordan* v *Gilligan* 500 F2d 601 (6th Cir. 1974, Cert Den 421 U.S. 991 (emphasis supplied) but where a court acts in a type of case within its competency (e.g. diversity authority, the judgment is not void. A comment to the *Restatement* covers the precise situation as follows:
>
> 'Thus if an action is brought in a federal court on the ground of diversity of citizenship, the judgment is not void although in fact there was not the necessary diversity of citizenship.' Restatement, supra #7, comment 7.
>
> and at page 123:

"Once final judgment is entered, however, the situation is different. At this stage, when the proceedings are completed, the federal court has expressly or impliedly found that it has subject matter jurisdiction and the parties have exhausted or waived (by inaction their rights to review such finding. The finding is thus res judicata. Put another way, the district *court has jurisdiction to determine its subject* matter jurisdiction over an action. The general principal is stated by Professor Moore as follows:

> 'Apart, then, from the case where the court's *action is a usurpation of power* the general proposition is that if the federal court . . . has the requisite jurisdiction over the defendant or res as the type of action warrants, it has jurisdiction over the subject matter. . . .'
>
> (emphasis supplied)
> *7 Moore's Federal Practice* 60.25 (2) at 306
>
> See also 11 C. *Wright & A. Miller Federal Practice & Procedure* #2862 at 201
> and at page 124

". . . I note that two competing judicial policies in deciding the present question. On the one hand there is the policy recognizing the limited jurisdiction of the federal courts. On the other hand, there is the policy favoring finality of judgments. Under the circumstances of this case, the latter policy must prevail over the former. 'To hold otherwise would destroy the certainty which allows controversies to be deemed judicially concluded.' *Lubben* v *Selective Service Systems* 453 F2d at 650."

Following are cases in support of the enunciated principles: *Stoll* v *Gotlieb*, 395 U.S. 165 (bot. 172), *Chicot County Drainage District* v *Baxter State Bank*, 308 U.S. 371 (377) (378). *Gosa* v *Mayden*, 413 U.S. 665 (690-1). *Vecchione* v *Wohlgemuth*, 426 F. Supp.,

1297558 F2d 150, ca cert den. 434 U.S. 943 at 1311. *Ackerman* v *United States* 340 U.S. 193 205 (1950) 198. *Dobbs, Beyond Boostrap:* Foreclosing the issue of Subject *Matter Jurisdiction before Final Judgment* 41 Minn. L. Rev. 491 (1967). *Chicago Law Review Vol. 36, page 268-9 (1969).*

A closely related situation was presented to the Ninth Circuit in *Yanow* v *Weyerhaeuser Steamship* 274 F2d 274 (9 ca, 1959) cert den 362 U.S. 919.

This question of the two principals involved, viz: on the one hand the policy of recognizing limited jurisdiction of the federal courts; on the other hand there is the federal policy of favoring finality of judgments was briefed earlier (See Bank's Reply Brief 10-12) Twenty-two cases and Treatises in support of the latter principal (Also Main Brief pps 8 through 16) were cited.

* * *

3. Question that jurisdiction question had never before (bench hearing), August 15, 1979 been addressed and because this case should be vacated under Fed. R. 60 (b) 4 or 60 (b) (6).

The Trial court made a finding that it had jurisdiction at the time default judgment was entered. (App. 1b).

The undisputed facts support Bank's claim that Olafsson acknowledged that the trial court had subject matter jurisdiction prior to August 29, 1979, 14 months after entry of default judgment, when the question of lack of jurisdiction because of lack of diversity of citizenship was first raised.

(a) For that 14 month period Olafsson sat on the Default Judgment for 1 year and then on June 7, 1979, he filed his initial Motion to set aside the Default Judgment (App. 28b-30b).

(b) Olafsson admitted he received a copy of Judgment in August or September, 1979 (App. 29b, par 8). As to Bank's version see (App. 91).

(c) On September 21, 1978, Notice of Bankruptcy letter from Canadian Trustee was filed in trial court (App. 37b-38b). On October 17, 1978, Attorney Burke's response to Canadian Trus-

tee's letter was mailed and filed with the Court June 22, 1979 (App. 38b-42b), causing Trustee to withdraw his request for a stay (See his affidavit and Exhibits attached His letter of September 21, 1978 (App. 38b), was then marked closed (upper right).

(d) A meeting was held between the Olafssons, their attorney, the Canadian Trustee, his attorney Mr. Boigon and Mr. Burke on December 1, 1978, as a result of disclosures made in Burke's letter to Trustee, dated October 17, 1978 (App. 38b-42b). The date of the meeting is referred to in affidavit of Trustee (App 50-1). wherein the charges against Olafsson were confirmed. Thereafter a criminal complaint was lodged by Trustee.

(e) After the appeal time had expired and relying on the finality of its judgment, Bank, on July 18, 1978, filed liens on 6 pieces of property on property claimed to be Olafssons, in Springfield Township, Oakland County, Michigan (App. 33-b also, App. 33b-34b-35b for background). Bank, on July 19, 1978, caused its default judgment to be recorded with the Oakland County, Michigan County Clerk, pursuant to 28 U.S.C. 1962. (Quit Claim deeds had been made by Olafsson to his wife, for a consideration of $1.00 each (see Deeds Exhibits 5 through 8, attached to Bank's main appellate Brief.
and though dated December 28, 1976, were not recorded until February 24, 1979, a month before filing bankruptcy. These deeds were void ab inito as in fraud of Creditors. *M.S.A.* 556.14; 37 C.J.S. 1141, and par 8 Reply Brief. On that assumption, the levies, etc. were made on the property.

(f) The original Motion to Set Aside Default Judgment was made on June 7, 1979, seeking relief from the trial court on two grounds (not including question of lack of diversity); (1) because he was never personally served with a copy of the complaint and (2) because he filed for bankruptcy in Canada on March 28, 1978, and claiming it was illegal to pursue claims. These two grounds were answered by Bank (Reply Brief p. 17 and 2, 3, 4).

(g) Subsequently Olafsson filed a Motion to Strike (App.

44b-45b) Trustee's Affidavit and Answer was filed by Bank (App. 42b-44b) Briefs which had nothing to do with diversity were filed.

The significance of this is that up to this point in time, Olafsson was accepting the court's jurisdiction and in reliance thereof was seeking the trial court's relief.

(h) These Motions though set for hearing on August 15, 1979, were not considered by the court while noting bank's equities yet based his decision "solely as indicated on the basis of the strong policy relative to subject matter jurisdiction in the Federal Courts." (App. 6b last par.).

Without an evidentiary hearing the district court rendered its opinion from the bench, finding that the Bank . . . knew or should have known of the citizenship of Olafsson . . . (Per Curiam (App. 4b) There is nothing in the record to support the trial court's said finding; that on the contrary Olafsson led Bank to believe he was a U.S. Citizen; that said data was delivered to Bank's counsel and it was upon this information that suit was filed in Federal Court (App. 50b-52b-53b) Bank was given no opportunity to refute this because the court had already rendered its opinion. Later Objections to this finding were filed and they are at App. 50b-52b-53b.

* * *

3. Question that jurisdiction question had never been raised before (bench hearing) August 15, 1979 and because this case should be vacated under *Fed. R. 60* (b) 4 or 60 (b) (6).

The trial court made a finding that it had jurisdiction at the time default judgment was entered. (App. 1b) Also please refer to (par. 3) * (f), (g) (h) herein, to establish fact that Olafsson by filing Motions between June 7, 1979 and time of first raising diversity issue by Supplement, August 2-9, 1979 (App. 48b) was acknowledging the trial court's jurisdiction and was seeking the trial court's relief based thereon.

The Complaint (App. 26b-27b) alleges complete diversity of citizenship. The cover, sheet, filed contemporaneously with the Complaint (App. 26b) alleges diversity. In the appropriate

blocks, Bank alleges that Olafsson was a citizen of the state of Michigan and Bank was a Canadian corporation. This was based on Bank's records, on information furnished by Olafsson, indicating that Olafsson was a U.S. citizen (App. 52b) note in long hand under 8/75 and affidavit of counsel, (App. 53b).

4. The bank "knew or should have known of the citizenship of Olafsson."

This question was first raised by the court in its Opinion (App. 4b) without an evidentiary hearing, and there is nothing in the record to support that finding. Bank was given no opportunity to refute that finding, until after hearing. The Bank then filed Objections to Specific Finding of that finding. (App. 58-59) and in support attached Bank's records, indicating that Olafsson was an American citizen (this was based on sworn affidavit of Bank's counsel (App. 53b), that "Defendant led Plaintiff to believe he was a United States Citizen."

* * *

5. Finding that the dispute between the parties could be fairly and complete adjudicated in the Canadian Bankruptcy.

The Per Curiam panel (App. 14) stated that the dispute between the parties could be more fairly and completely adjudicated in the Canadian bankruptcy Court . . . " The claim that the Bank will be completely adjudicated and protected in the bankruptcy proceedings is not correct. The Per Curiam panel overlooked and misapprehended the true posture, viz: (this is pointed on p. 23 Reply Brief but exchange rates are up-dated). The claim that the claim which the Bank has will be completely adjudicated and protected in the bankruptcy was misapprehended. The amount to which the Bank is entitled in U.S. funds is the sum of $36,233.56 as at March 29, 1979 (App. 35b) to which must be added interest at 6% from March 29, 1979 to March 29, 1981, viz: $40,712.02 plus $1100.00 for Marshal's fees on sale, publication and miscellaneous charges estimated at $1100.00, a total of $42812.02. The Canadian Bankruptcy

Schedule Addenda Exhibit 9 lists Bank of Montreal as an unsecured creditor in the sum of $31,000.00 Canadian which at present rate of exchange translates to $24,955.00. Additionally, at present Bank under its judgment and with its certificate of sale has the status of a secured creditor.

It was Bank's attorney whose investigation uncovered Olafsson's fraud and discovered 40 acres of improved land of substantial value, rather than the 10 acres reported by him on the Questionaire (App. 35b). See also (App. 39b-44b) confirmed by Trustee, (App. 43b) par 6. Under the circumstances it would be unfair to deprive Bank of $17,857.02 by relegating it to the category of general creditor. (As an officer of the court counsel for Bank represents that at the time of the loans 1975-76, Canadian currency had a value of $1.05 to the U.S. dollar, and as at May 12, 1981 the Wall Street Journal listed Canadian Dollar as 19.5% off the U.S. dollar or 80.5 cents.)

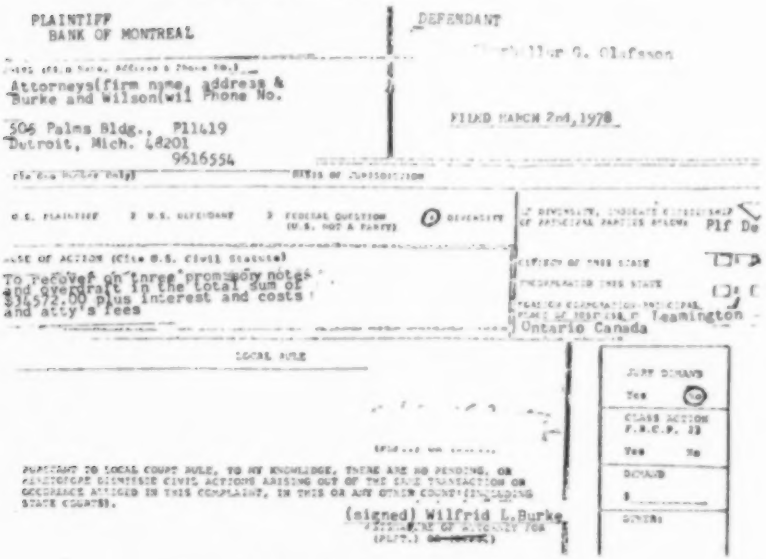
* * *

## ESTOPPEL

The Honorable Judges of the panel, did not reach the question of ESTOPPEL, raised in Bank's main Brief, at page 18. The facts stated in the main Brief pages 3-6, and pages 8, 9, 10 (a), (b), (c), (d), (e), (f), (g) make it demonstrably clear that Olafsson is estopped from assailing the final judgment of the bank. Why should not a party who has invoked federal jurisdiction or failed seasonably to object to it, be held to have waived any defect, or be estopped from asserting it?

Pertinent parts of Sheet filed contemporaneously with Complaint, pursuant to court rule.

Pertinent parts of Sheet filed contemporaneously with Complaint, pursuant to court rule.


PLAINTIFF
BANK OF MONTREAL

DEFENDANT

Attorneys(firm name, address & Phone No.
Burke and Wilson(wil
506 Palms Bldg., Pl1619
Dutroit, Mich. 48201
9616554

FILED MARCH 2nd, 1978

To recover on three promissory notes and overdraft in the total sum of $37572.00 plus interest and costs and atty's fees

Pltf De

Toronto, Province of Ontario Canada

(signed) Wilfrid L.Burke

# UNITED STATES DISTRICT COURT
# FOR THE EASTERN DISTRICT OF MICHIGAN
# SOUTHERN DIVISION

BANK OF MONTREAL, a Canadian corporation, Plaintiff,

vs. No. 870482

THORHALLUR G. OLAFSSON, Defendant

Filed March 2, 1978

## COMPLAINT

NOW COMES Bank of Montreal, a Canadian Corporation, by its attorneys, Burke and Wilson and says that:

1. Plaintiff, Bank of Montreal, is a Canadian Corporation.

2. Defendant, Thorhallur G. Olafsson is a resident of Springfield Township, in the County of Oakland, State of Michigan.

3. This controversy involves a sum in excess of $10,000.00 exclusive of interest and cost.

4. A complete diversity of citizenship exists between plaintiff and defendant.

5. Defendant on or about July 29, 1975, executed and delivered to plaintiff a promisory note, a copy of which is attached hereto as *Exhibit A*, whereby defendant promised to pay to plaintiff or order on demand the sum of $15,000.00 with interest thereon at the rate of 10 percent per annum.

6. Defendant on or about October 14, 1975, executed and delivered to plaintiff a promisory note, a copy of which is attached hereto as *Exhibit B* whereby defendant promised to pay to plaintiff or order the sum of $10,000.00 with interest thereon at the rate of 10 and ¾ percent per annum.

7. Defendant on or about March 15, 1976, executed and delivered to plaintiff a promisory note, a copy of which is attached hereto as *Exhibit C*, whereby defendant promised to pay to plaintiff or order on demand the sum of $4,000.00 with interest thereon at the rate of 10 and ¼ percent per annum.

8. On or about August 31, 1975, made an overdraft on his account with plaintiff in the sum of $939.67, a copy of which statement is attached hereto as *Exhibit D*, and that the defendant is indebted to the plaintiff in the sum shown on *Exhibit D*, viz.

9. Despite repeated demands, said defendant has refused to pay any part of said total sum of Thirty-Four Thousand Five Hundred Seventy Two and 08/100 ($34,572.08) Dollars.

WHEREFORE, Plaintiff, Bank of Montreal, prays for judgment in the amount of Thirty-Four Thousand Five Hundred Seventy Two and 08/100 ($34,572.08) Dollars plus costs and interest from the date hereof.

Dated: February 28, 1978

BURKE AND WILSON
By: /s/ WILFRID L. BURKE
Wilfrid L. Burke (P-11419)
Attorney for Plaintiff
505 Palms Building
Detroit, Michigan 48201
Telephone: 961-6554

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BANK OF MONTREAL,
a Canadian corporation,

Plaintiff,

vs. No. 870482

THORHALLUR G. OLAFSSON,

Defendant

File June 7, 1979

## MOTION TO SET ASIDE DEFAULT JUDGMENT AND TO DISMISS

NOW COMES Defendant Thorhallur Olafsson, by and through his attorneys, PIERCE & PIERCE, P.C., and pursuant to F. R. Civ. P. 60(b) respectfully moves this Honorable Court to set aside the Default Judgment entered in this cause and dismiss Plaintiff's action. In support of this motion, Defendant states as follows:

(1) The lawsuit commenced by the Bank of Montreal is based upon certain promissory notes executed by Defendant in Canada.

(2) That the purpose of the loan to Defendant by Plaintiff Bank of Montreal was to enable Defendant to conduct a business located solely in Canada and purchase certain land in Canada.

(3) That the law of Canada should apply to said debt.

(4) That defendant was never personally served with a copy of the Complaint filed in this action by a United States Marshall nor any other person who was qualified to serve legal process.

(5) That on March 28, 1978, Defendant filed an Assignment in Bankruptcy in Canada when his business failed.

(6) That the Bank of Montreal was properly notified of said bankruptcy. .

(7) That it is illegal under Canadian law for a creditor to commence an action while a bankruptcy is pending.

(8) That Defendant did not receive a copy of the Judgment which was illegally obtained by Plaintiff until August or September, 1978, and that upon receipt of said judgment Defendannt notified his representative in bankruptcy who sent this Court a letter dated September 15, 1978.

(9) That the default judgment obtained by the Bank of Montreal was obtained illegally, without full disclosure to the Court and is void.

WHEREFORE, Defendant prays that the Court set aside the default judgment entered in this cause and dismiss Plaintiff's action.

PIERCE & PIERCE, P.C.
By: /s/ MARK C. PIERCE (P-25946)
2500 Book Building
Detroit, Michigan 48226

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BANK OF MONTREAL,
a Canadian corporation,

Plaintiff,

vs. No. 870482

THORHALLUR G. OLAFSSON,

Defendant

Judge Ralph B. Guy, Jr.
Filed June 7, 1979

AFFIDAVIT OF THORHALLUR OLAFSSON
IN SUPPORT OF MOTION
TO SET ASIDE DEFAULT JUDGMENT

THORHALLUR OLAFSSON, first duly sworn, deposes and states as follows:

(1) That he is the Defendant in the above entitled cause.

(2) That he was not and has not been personally served with the Complaint filed by the Bank of Montreal in this cause.

(3) That he received the Complaint from his nine (9) year old daughter.

(4) That he filed an assignment in Bankruptcy on March 23, 1978, in Windsor, Canada.

(5) That the Bank of Montreal was listed as a creditor and duly notified by the Bankruptcy Trustee.

(6) That he has promptly forwarded all documents he has received to the Bankruptcy Trustee who was supposed to be taking care of the lawsuit.

Further the deponeth sayeth not.

/s/ THORHALLUR OLAFSSON

Subscribed and sworn to before me this 5th day of June, 1979.

CYNTHIA G. CONWAY
Notary Public, Wayne County, Mich.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BANK OF MONTREAL,
a Canadian corporation,

Plaintiff,

vs. No. 870482

THORHALLUR G. OLAFSSON,

Defendant

Filed June 22, 1979

## ANSWER TO MOTION TO SET ASIDE DEFAULT JUDGMENT AND TO DISMISS

Now comes Bank of Montreal, a Canadian Corporation, Plaintiff, by its attorneys, Burke and Wilson, for answer to the Plaintiff's Motion to Set Aside Default Judgment and to Dismiss, says:

1. Plaintiff admits.

2. Plaintiff has no knowledge as to the use defendant put the loans referred to, except that said loans were purportedly used to raise and market crops; the remaining allegation is denied.

3. Plaintiff denies.

4. As to service of summons the return of service by the United States Marshal, shows service by leaving Summons and Complaint with Donna Olafsson, wife of Thorhallur G. Olafsson, which service is proper by virtue of Rule 4 (d) (1) of Federal Rules of Civil Procedure (See original in Court File)

5. Plaintiff admits the Defendant filed an Assignment in Bankruptcy in Canada, on March 28, 1978, but assert on information and believe that the defendant and his family abandoned the farm at Belle River, Ontario, leaving Canada to go to the United States, in the month of August, 1976.

6. As to whether the Bank of Montreal was "properly notified of said bankruptcy" Plaintiff neither admits nor denies but leaves defendant to his proof.

7. Plaintiff denies the same and in support thereof says that the within suit was brought in the United States District Court for the Eastern District of Michigan, Southern Division; that said defendant was and has been domiciled in Michigan from at least 1976 to the date of filing and service was made at defendant's residence at 10925 Andersonville Road, Springfield Township, Davisburg (Oakland County) Michigan; that Michigan and U.S. law is applicable. Further that Canadian law has no force or effect outside the Dominion of Canada from which its authority is derived.

8. Plaintiff denies that it did not send defendant a copy of the Judgment herein; and states that the defendant having failed to enter an appearance in said cause was not entitled to a copy there. But Plaintiff says, however, that said defendant was notified by Notice dated May 25, 1978 mailed on that date that "Judgment upon Application, copy of which was attached would be presented to the Honorable Ralph B. Guy, Jr. District Judge, 8th Floor Federal Building Detroit, Michigan on

Wednesday, May 21, 1978 at 2:30 P.M. (Exhibits 2 a, b, c) (See this Appendix 76).

Plaintiff admits that the Trustee Albert Soufrine sent the Court Clerk a letter dated September 15, 1978, (Exhibit 3), that the basis of said letter was false information supplied to said trustee, as more fully appears from that affidavit of said Trustee, attached hereto as Exhibit 6 and Exhibit 4. Plaintiff denies the remaining allegation therein.

9. Plaintiff Denies

Wherefore Plaintiff prays that said Motion to Set Aside Default Judgment and to Dismiss be denied with costs and attorneys fees to be taxed.

Dated June 21, 1979

BURKE AND WILSON
By: /s/ WILFRID L. BURKE (P-11419)
1303 Mutual Bldg.
Detroit, MI 48226, 961-6554

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BANK OF MONTREAL,
a Canadian corporation,

Plaintiff,

vs. No. 870482

THORHALLUR G. OLAFSSON,

Defendant

Honorable Ralph B. Guy, District Judge
Filed June 22, 1979

Wilfrid L. Burke, being first duly sworn, deposes and says that if sworn as a witness he can competently testify as follows: That he has read the foregoing Answer to Motion to Set Aside Default Judgment and to Dismiss, and the facts stated therein are true of his personal knowledge except as to those matters

therein stated to be on information and belief as to those matters he believes it to be true.

/s/ WILFRID L. BURKE

/s/ IRENE F. BURKE
Notary Public Wayne County, Michigan
My commission expires April 25, 1983

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BANK OF MONTREAL,
a Canadian corporation,

Plaintiff,

vs. No. 870482

THORHALLUR G. OLAFSSON,

Defendant

Honorable Ralph B. Guy, Jr., District Judge
Filed June 22, 1979

## AFFIDAVIT IN SUPPORT OF ANSWER TO MOTION TO SET ASIDE DEFAULT AND TO DISMISS

Wilfrid L. Burke, being duly sworn, deposes and says that if sworn as a witness he can competently testify as follows:

1. On July 18, 1978 deponent filed liens on 6 parcels of land in the Township of Springfield, Oakland County, Michigan as described in Certificate of Sale Exhibit 9 (App. 42-3)

2. On July 19, 1978 deponent filed Default Judgment, pursuant 28 USC 1962. Tr. No. 78 2525 (App. 44)

3. On January 30, 1979 a Writ of Execution issued herein and was delivered to the U.S. Marshal.

4. On February 6, 1979 Noticy of Levy was filed with the Oakland County Register of Deeds, on property herein.

5. On February 8, 1979 Assignment for the Benefit of Creditors on property herein involved was filed by Trustee in Oakland County Register of Deeds Office.

6. On March 29, 1979 pursuant to published notice and posting a sale was made by the U.S. Marshal at the County Building in Pontiac, Michigan of the property hereinabove described and was bid in by the Bank of Montreal, Plaintiff for the amount of judgment plus interest and costs and a Certificate of Sale (Exhibit 9 and pages 85-6 of the Appendix) was issued by the U.S. Marshal and was duly recorded with the Register of Deeds of Oakland County. (April 6, 1979).

Subscribed and sworn to before me this
21st day of June, 1979

/s/ IRENE F. BURKE
Notary Public, Wayne County, Michigan.
My commission expires: April 25, 1983

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CERTIFICATE OF U.S. MARSHALL RE SALE OF PROPERTY OF OLAFSSON 13

UNITED STATES OF AMERICA
COUNTY OF OAKLAND
STATE OF MICHIGAN } ss LIBER 7479 PAGE 614

FILED APRIL 6,1979

I do hereby certify by virtue of a Writ of Execution, dated January 30,1979, issued by the United States District Court for the Eastern District of Michigan, Southern Division, in the case of Bank of Montreal, a Canadian corporation, plaintiff versus Thorhallur G. Olafsson, defendant, case number 8-0482, wherein said plaintiff obtained judgment against said defendant, on May 31,1978; and that the amount actually due on March 29,1979 was the sum of $36,233.56 Of this total $34,430.26 is the amount of the original judgment, including $30.00 court costs, as entered, plus interest at 6% to March 29,1979. I do further certify that on March 29,1979, I exposed for sale at the front door of the Oakland County Court Building, 1200 N. Telegraph Road, Pontiac, Michigan, pursuant to published notice and posting as required by law, the real estate described as follows:

(DESCRIPTION DELETED)

I further certify at said time and place I opened the bidding and offered to accept bids as a whole or in separate parcels. Bids were made by Wilfrid L.Burke attorney, representing the Judgment Creditor, Bank of Montreal, a Canadian corporation under both categories and the sum bid under each category was identical, viz: $36,233.56 , that being the amount of the judgment of Bank of Montreal, a Canadian corporation plus interest at 6% to March 29th,1979.

I further certify that thereafter I held the sale open until 11 A.M. on said date and no other bidders having appeared , I thereupon closed the bids.

I further certify that the time when the sale heretofore made on the above described property shall become absolute on March 29,1980 and the purchaser, Bank of Montreal, a Canadian corporation, shall thereupon be entitled to a deed for the above described property, pursuant to Sec'n 600.6067 Michigan Compiled Laws as amended.

I further certify that the rate of interest on aforesaid $36,233.56 is 6% per an um from and after March 29,1979.

In witness whereof I have hereunto subscribed my name and caused my seal of office to be affixed to this certificate, at Detroit, Michigan, this 6th day of April,1979.

Anthony Bertoni, United States Marshal

By: Anthony Bertoni
ANTHONY
BERTONI

In the Presence of:

WILLIAM REASCHD

(AFFIDAVIT OF PUBLICATION AND AFFIDAVIT OF POSTING ATTACHED TO ORIGINAL BUT OMITTED HEREIN)

14

EXCERPT FROM BANKRUPTCY QUESTIONAIRE
OF THORHALLUR GUNNAUGUR
OLAFSSON

DOMINION OF CANADA
PROVINCE OF ONTARIO

IN THE MATTER OF THE BANKRUPTCY OF
THORHALLUR GUNNSAUGUR OLAFSSON
formerly residing in the town of
Belle River of the County of Essex
of the Province of Ontario and and
operating as Belle River Greenhouses,
Carpenter
Summary Administration

File No.
011977
(Filed in U.S. District Court, Detroit, Michigan with Answer to Set Aside Judgment, June 22,1979)

#32 Continued . . .

(3) I had 10 acres in Springfield Twp., Oakland County, in the U.S. I bought it in 1960 for $14,000. It was fully paid. In 1976 I was going to lose it for back taxes, which were $16,000. My present wife, using her funds, bought it in her name.

(original initialed by Mr. Olafsson, viz: T.G.O.)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BANK OF MONTREAL,
a Canadian corporation,

Plaintiff,

vs. No. 870482

THORHALLUR G. OLAFSSON,

Defendant

Honorable Ralph B. Guy, District Judge

REGISTRATION OF FEDERAL JUDGMENT
PURSUANT TO TITLE 28 UNITED STATES
CODE ANNOTATED, 1963

Filed July 19, 1978.

Registration of the attached certified copy of Judgment of United States District Court for the Eastern District of Michigan Southern Division. Said Judgment was rendered by the Honorable Ralph B. Guy, District Judge on May 31, 1978, in favor of Bank of Montreal a Canadian Corporation, plaintiff v Thorhallur G. Olafsson, Defendant who resides presently at 10925 Andersonville Road, Davisburg, Oakland County, Michigan 48019. This registration of Federal Judgement is made pursuant to Title 28 United States Code Annotated #1963.

Bank of Montreal, A Canadian
Corporation, (Plaintiff)
By: /s/ WILFRID L. BURKE (P-11419)
505 Palms Building
Detroit, Michigan 48201
Telephone: 961-6554.

ALBERT H. SOUFRINE
Chartered Accountant

EXHIBIT 3
Filed September 21, 1978
(Filed as Exhibit attached to Answer to Motion to set aside default) (App. 38)

U.S. District Court,
Eastern District of Michigan.
Federal Building,
Fort & Shelby,
Detroit, Michigan.

September 15, 1978

Gentlemen:

Re: Thorhallur G. Olafsson and the Bank of Montreal, Plaintiff.
Liens #7256-831, 834, 837, 840 7260-71.

The above person filed an assignment in bankruptcy on March 28, 1978, Enclosed is a copy of the Notice sent to creditors, which includes the Bank of Montreal. Burke & Wilson, attorneys, 503 Palms Blvd., Detroit are shown on the supplementary mailing.

At the properly constituted creditors' meeting held on April 19, 1978, no creditors were present. The Bank, as yet, has not filed a proof of claim. However, it was aware that Olafsson had filed an assignment.

Enclosed is a true copy of my authority to act in the matter.

The Bank's solicitors in Canada are Spettigue, Reid in Leamington, Ontario. There appears to be a question as to the transfer of property to the wife, made prior to his action. It was only recently that I learned that this had occurred. Legal documentation was sworn on October 27, 1976 and occurred because these lands were in the process of being lost for failure to pay taxes. The wife, on December 27, 1976, paid approximately $5,500 to the Oakland County Treasurer. This was its

idence wherein they live. Funds came entirely from her resources, and had been accumulated prior to their association. In addition, since then all taxes have been paid by her.

On May 23, 1978 Mrs. Olafsson had a legal search made on the property. She then found that there were two parcels, each 100' x 260', that had been involved in the county foreclosure, but which had not been transferred to her. These now are in her sole name.

These parcels had previously been directed to Olaffson's children, with the intention that residences would be available. This was not required, and since they had not paid for them, a Quit Claim Deed was given to the wife.

Legal documentation is available in my office. It is suggested that action on the liens be kept in abeyance until a decision is reached by the proper authorities.

It would be appreciated if I were kept advised of any further developments.

Yours very truly,
ALBERT H. SOUFRINE

EXHIBIT 4

(Filed as Exhibit attached to Answer to Motion to Set aside Default) (App 38)

October 17, 1978

FILED June 22, 1979
(with Answer to Motion
to Set Aside Judgment)

Mr. Albert H. Soufrine
Licensed Trustee in Bankruptcy
302 Ouelette Avenue
Post Office Box 877
Windsor, Ontario Canada N9A 6P2
Re: Thorhallur G. Olafsson and the Bank
of Montreal, Pl. Liens 7256-831,834,
837, 840, 7260-71

Dear Mr. Soufrine:

On September 15, 1978, you wrote the U.S. District Court in connection with the above, wherein Bank of Montreal obtained Judgment against Mr. Olafsson, and you sent me a photocopy of that letter. I think in all fairness, to you, I should respond for Mr. Olafsson has mislead you.

In your letter you state, the wife, Mrs. Donna Olafsson on December 27, 1976 paid the approximate sum of $5,500.00 to the Oakland County Treasurer. I don't know what "documentation" was furnished you, but the best evidence of that payment would be the receipt from the Oakland County Treasurer. I have asked local counsel for Mr. Olafsson to furnish me with a photocopy of such receipt but he has been unable to do so. I enclose photocopy of my letter to him. When he failed to comply I personally checked the records of the Oakland County Treasurer and found that no such payment had ever been made, on this property. The records show that no tax payments at all were made in the year 1976, on Olafsson property. No payment even in or close to the sum of $5,500.00 was ever paid on this property.

Counsel for Mr. Olafsson furnished me with Tax receipts, copies of which are attached and marked A. These receipts clearly show on their face that the taxes were paid by Mr. Olafsson and not by his wife. They further show the taxes in the total sum of $1,390.63 was paid on April 1, 1977. The $1,390.63 is the consideration for a tax deed (Attached, marked B) from Dominic Merussi, dated April 26, 1977 which acknowledged receipt of that sum from Mr. Olafsson and not from Mrs. Olafsson. At the bottom of the deed is a note to return to Mr. Olafsson and not Mrs. Olafsson. This deed was held off the record until after the initiation of bankruptcy, viz: April 28, 1978.

(Tax Bills omitted herein)
(Tax deed not attached herein)

(Deeds c, d)

Attached and marked C is the deed which was from Thorhallur G. Olafsson & Donna J. Olafsson, his wife transferring the same property as referred to in deed B, to Donna J. Olafsson, for $1.00 consideration, and is dated December 28, 1976, but not recorded until February 24, 1978. Though Mrs. Olafsson was a joint grantor, she did not sign the deed. Under U.S. practice the drafter of the deed must sign in the appropriate box. This box indicated the deed was drafted by Mr. Olafsson, and significantly was marked in hand-writing "Return to Mr. T. G. Olafsson." Under U.S. practice there is a revenue tax of $1.10 per thousand and since the consideration here was only $1.00 no tax was collected since amounts under $100.00 are not taxable. If the consideration was more than that, it should have so been stated, for the state is fussy about collecting its revenue taxes.

The deed marked D is from the former wife of Mr. Olafsson to Mr. Olafsson, made after their divorce, dated October 27, 1976, which is the date referred to in your letter in reference to legal documentation. This property, presumably, was the property referred to in Mr. Olafsson's answer to 22 of his sworn statement filed with you, wherein he stated the equity was $18,000.00 to $20,000.00. Not that this property was returned to him for $1.00. It was drafted by Mr. Olafsson, as appears from the box and there was another box, which noted that future tax bills were to be sent to Mr. T. Olafsson.

In his sworn statement Supple. Answer to 32(3), Mr. Olafsson stated he had "10 acres in Springfield Township which he bought in 1960 for $14,000.00 and was fully paid for" and he further stated: "In 1976 was going to lose it for back taxes WHICH WERE $16,000.00. My present wife using her funds BOUGHT IT IN HER NAME." The record of Deed B shows this claim is demonstrably false, as to the wife using her funds. Furthermore, the records and tax receipts furnished me by local counsel, shows that there was not one tract as Olafsson

said, but 4 tracts, identified on tax bills as: 07 2235, 007, 0722351 008, 007 2351 009, 07 22351 010 (the last two are shown as bills, and not payments) This information was withheld from the Trustee. If the one acreage of 10.10 was worth $16,000.00 to $17,000.00 at date of transfer to his wife (as he stated in answer to 40, sworn statement; then an identical acreage should have been an equal amount.

The tax on 07 2235 007, which presumably was the one tract disclosed to the Trustee, as of August 23, 1976, was only $771.02 and not the $16,000.00 Olafsson claimed was due in back taxes. Even if you total all of the taxes due on all of 4 tracts the total is less than 25% of the $16,000.00 claimed.

On Olafsson's claim that his wife made tax payments, the only taxes which she paid as shown by the tax bills furnished me were paid on May 10, 1978, May 22, 1978, May 23, 1978 and September 20, 1978. The bankruptcy was initiated on or about April 19, 1978. These alleged payments were simply an attempt by Olafsson, to shown ownership of his property "after the fact" in his wife. All earlier taxes were made by Olafsson as clearly shown by Oakland County Treasury records. Further these payments on taxes were made after he "was aware of his insolvency about February 1, 1977" (see his answer to question 18, in sworn statement)

I received from counsel at my request a photo copy of the bank book, showing withdrawals from her account. While there was a $6,000.00 withdrawal from her account on or about December 27, 1976, it was used for some other purpose and not for taxes, as has been demonstrated herein. The bank book shows no withdrawals on April 1st, 1977 to justify inference that money was withdrawn from her account to pay the $1390.63 paid in taxes on that date: There were no withdrawals from February 22, 1977 thru May 25, 1977, except for three $50.00 and two $25.00 withdrawals. There was an ultimate withdrawal of the balance of $1,822.57 on September 19, 1977, leaving a balance in the account of $10.00, which leaves open

the question of where she got the $2,803.57 to pay the taxes she paid in her name, allegedly, in 1978.

In addition to the above there was a deed by Jensina M. Saylor and John Saylor to Thorhallur G. Olafsson and Donna J. Olafsson his wife, on deed drafted by Mr. Olafsson for 0.6 acres of land (marked E) attached; also a deed from the Olafssons to Dale Johnson, wherein the Olafssons received $3,500.00 on the sale of property. That deed is dated February 23, 1978 and undoubtedly has not been reported to the Trustee. Deed attached, marked F.

In your letter you speak of a County Foreclosure. A careful search of the Oakland County records this claim has no basis in fact. As to the deed from Olafsson's son, your claim that the property referred to (G, attached) was deeded to the wife is incorrect. The property was deeded to Thorhallur G. Olafsson and Donna J. Olafsson, and was dated May 17, 1978. He presently has a half interest therein. Incidentally this too was drafted by Mr. Olafsson.

I hope this lengthy explanation will straighten this matter out.

Sincerely,
/s/ W. L. BURKE

IN THE MATTER OF THE BANKRUPTCY OF THORHALLUR GUNNLAGUR OLAFSSON FORMERLY RESIDENT IN THE TOWN OF BELLE RIVER, ONTARIO, CANADA

STATE OF MICHIGAN, County of Wayne: ss.

Albert H. Soufrine being first duly sworn, deposes and says, if sworn, as a witness he can competently testify as follows:

1. That he is and has been for the period of several years prior to March 23, 1978 and up to the date hereof, a Licensed Trustee in Bankruptcy for the Province of Ontario, Canada and has his office at 302 Ouellette Avenue, Windsor, Ontario, Canada.

2. That in the course of processing the documents in Bankruptcy, the method followed is to interview the proposed bankrupt and to ascertain what if any assets he has. Certain documents are prepared (Exhibits 1. 1a) and typed under my direction. Exhibit 1 is a questionaire, prepared and typed under my direction from the answers given to me. This preliminary work was done on March 23, 1978 and prior thereto in the above matter. The bankrupt is given an opportunity to go over his answers and to make corrections if required. Then on April 19, 1978, the bankruptc appeared before Offician Receiver Evans Boice who placed the bankrupt under oath and required him to swear that the answers to the questions were true. Questions which had not been completely answered or were incorrect would be corrected and initialed by the bankrupt and then sworn to by him as true. So that on two separate occasions question in Exhibit 1 were propounded to said bankrupt.

3. In the month of August or early September, 1978, the bankrupt and his wife made representations and brought in data which this deponent, relying thereon, incorporated in a letter sent to the Clerk of the U.S. District Court, Detroit, Michigan. (see Exhibit 3)

4. Later deponent received a written response from Counsel for Bank of Montreal, Wilfrid L. Burke, (Exhibit 4) As a result of disclosures in Exhibit 4 and documents furnished this deponent, he was concerned and retained U.S. counsel, Mr. Irving Boigon, who sent letters to the Olafssons and Counsel Burke to attend a meeting on December 1, 1978.

5. The meeting was held on said date at the office of Attorney Boigon, at which Olafssons were present, with their then attorney, Mr. Gottfried; also present were Mr. Boigon, Mr. Burke and this deponent.

6. At said meeting the charges of Attorney Burke, as set forth in his letter, Exhibit 4, were confirmed.

7. Thereafter the matter was re-submitted to Corporal R. R.

MacDonald, Commercial Crime Section, Royal Canadian Mounted Police who made a thorough investigation and as a result, a Complaint was filed and warrants issued against Thorhallur Gunnlagur, as shown by Exhibits 7 and 8.

/s/ ALBERT H. SOUFRINE

Subscribed and sworn to before me this 22nd day of June, 1979.

/s/ IRENE F. BURKE
Notary Public, Wayne County, Michigan
My Commission Expires April 25, 19

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BANK OF MONTREAL,
a Canadian corporation,

Plaintiff,

vs. No. 870482

THORHALLUR G. OLAFSSON,

Defendant

Judge Ralph B. Guy, Jr., District Judge
Filed July 2, 1979

MOTION TO STRIKE

NOW COMES, Defendant, Thorhallur Olafsson, by and through his attorneys, Pierce & Pierce, P.C., and pursuant to F.R. Civ. P. 12 (f) respectfully moves this Honorable Court to strike the affidavit of Albert H. Soufrine and the Answer to Motion to Set Aside Default Judgment filed by the Bank of Montreal in this case. In support of this motion Defendant states as follows:

(1) The Answer to Motion to Set Aside Default Judgment and the Affidavit of Albert H. Soufrine contain improper and outrageous references to an alleged criminal investigation of Defendant by Canadian Police. All such references to any such

alleged criminal investigation are improper, scandalous and intended only to unfairly prejudice the court.

PIERCE & PIERCE, P.C.
By: MARK C. PIERCE (P25946)
Attorney for Defendant
2500 Book Building
Detroit Michigan 48226
(313) 962-7020

What difference does it make to this case whether the Canadian Police have or have not issued warrants of any kind. If such has been done, it only indicates to Defendant that the Bank of Montreal has considerable political power. But an arrest warrant is not probative of any fact if the presumption of innocence has any meaning unless Plaintiff is prepared to argue that there is no presumption of innocence. In short, Defendant submits that the Bank of Montreal's only purpose in alleging the existence of an arrest warrant is to prejudice this court and prevent a full hearing on the merits. Under the circumstances, all references to any action by the Canadian Police should be stricken from the record and Defendant be awarded the costs of this motion.

PIERCE & PIERCE, P.C.
By: Mark C. Pierce (P-25946)
Attorney for Defendant
2500 Book Building
Detroit, Michigan 48226
(313) 962-7020

(Note: To avoid Prolixity memorandum of law of both defendant and plaintiff in their respective motion and answer thereto were not attached. Please see record for respective law hereon filed July 2nd and July 10, 1979)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BANK OF MONTREAL,
a Canadian corporation,

Plaintiff,

vs. No. 870482

THORHALLUR G. OLAFSSON,

Defendant

Honorable Ralph B. Guy, Jr., District Judge
Filed July 10, 1979

## ANSWER TO DEFENDANT'S MOTION TO STRIKE AFFIDAVIT OF ALBERT H. SOUFRINE, CANADIAN TRUSTEE IN BANKRUPTCY

Now comes Bank of Montreal, a Canadian Corporation, Plaintiff, by and through its attorneys, Burke and Wilson (Wilfrid L. Burke) for answer to the Motion to Strike Affidavit of Albert R. Soufrine, Canadian Trustee in Bankruptcy, says:

(1) Plaintiff denies each and every allegation therein contained and denies that the reason therein in claimed are sufficient in law to strike the same. In support thereof plaintiff asserts that the said Affidavit (Exhibit 6) attached (Appendix 49-50) and to Plaintiff's Answer to Motion to Set Aside Default Judgment, was made necessary by defendant's reference to a letter sent by said Albert H. Soufrine, to the Clerk of the District Court herein, (Appendix 44-45), dated September 15, 1978, in defendant's Motion, (Paragraph 8) (Appendix 36), which said letter was based on false information furnished said Trustee (Said Letter is in the Court Filed and is marked presumably by the Clerk, "Closed.") by the defendant. That later, as more fully appear in said affidavit, the information given in said letter was discovered by said affiant to be false, which triggered the proceedings in Canada, to which said defendant now bases this Motion to Strike. Further case law does not

support this Motion to strike, as more fully appears from Brief attached hereto.

(2) Counsel failed to comply with District Court Rule 9 in that he failed to discuss and allege in his Motion that he had so discussed said Motion for the purpose of acquiescence or rejection by counsel for Defendant, prior to the filing thereof on July 2, 1979.

BURKE AND WILSON
By: /s/ WILFRID L. BURKE (P-11419)
Attorneys for Plaintiff
1303 Mutual Bldg.
Detroit, Michigan 48226
961-6554

Dated: July 9, 1979

State of Michigan, County of Wayne, SS

Wilfrid L. Burke, being duly sworn, deposes and says that if sworn as a witness, he can competently testify to the matters set forth herein, that he has read the same, and the allegations are true of his own knowledge except as to matters therein stated to be on information and belief.

/s/ WILFRID L. BURKE

Subscribed and sworn to before me this
9th day of July, 1979
/s/ IRENE F. BURKE
My Commission Expires April 25, 1983

(Note: To avoid prolixity memorandum of law of both plaintiff and defendant in their respective answer and motion thereto were not attached. Please see record for respective law hereon, filed July 2nd and July 10, 1979).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BANK OF MONTREAL,
a Canadian corporation,

Plaintiff,

vs. No. 870482

THORHALLUR G. OLAFSSON,

Defendant

Judge Ralph B. Guy, Jr.
Filed August 2, 1979
(EXCERPT FROM MEMORANDA OF LAW
BY APPELLEE-DIVERSITY FIRST RAISED)

## SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SET ASIDE DEFAULT JUDGMENT AND DISMISS

Sometimes when a problem is analyzed simple answers are overlooked when more complex answers appear. In this case defendant has filed *inter alia* two memorandums of law supporting a Motion to Set Aside Default Judgment and Dismiss in which considerable time was spent analyzing Canadian law. Defendant's counsel has just realized, however, that a much simpler solution to the question of this court's jurisdiction exists and although the points raised in the previous memorandums are corrent and valid it may not be necessary for the court to reach those issues. The plaintiff is a citizen of Canada. The defendant is a citizen of Iceland, (Exhibit A). As such they are both aliens and no federal court has jurisdiction over a lawsuit between two aliens. 28 USC 1332, *Montalet & Murray*, 4 Cranch (8 US) 46, 2 Led 545, (1807) *Mossman & Higginson* 4 Dall 12, 1 Led 720 (1800), *Hodson & Bowerbank*, 5 Cranch (9 US) 303, 3 Led 108 (1809), *Kramer & Caribbean Mills, Inc.*, 394 US 823, 824 N. 2, 89 S. Ct.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BANK OF MONTREAL,
a Canadian corporation,

Plaintiff,

vs. No. 870482

THORHALLUR G. OLAFSSON,

Defendant

Judge Ralph B. Guy, Jr.
Filed August 9, 1979

AFFIDAVIT OF THORHALLUR OLAFSSON

THORHALLUR OLAFSSON, first being duly sworn, deposes and states as follows:

(1) That he is named as the Defendant in the above entitled case.

(2) That he is not a citizen of the United States or the State of Michigan.

(3) That he was born in Iceland of Icelandic parents and is an Icelandic citizen.

/s/ THORHALLUR G. OLAFSSON

Subscribed and sworn to before me this
9th day of August, 1979
/s/ DUANE M. OLK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BANK OF MONTREAL,
a Canadian corporation,

Plaintiff,

vs. No. 870482

THORHALLUR G. OLAFSSON,

Defendant

Honorable Ralph B. Guy Jr., District Judge
Filed November 6, 1979

## OBJECTION TO SPECIFIC FINDING OF HONORABLE RALPH B. GUY JR. IN THE COURT'S OPINION OF OCTOBER 22, 1979

(Sic August 15, 1979)

Now comes Bank of Montreal, Plaintiff, by Burke and Wilson, its attorneys, filing this Objection to the Specific Finding of the Honorable Ralph B. Guy, Jr. in the Court's Opinion of sic August 15, 1979 October 22, 1979, and says: *(Appendix 4-10) (Transcript August 15, 1979).

1. In said Opinion (page 3) the Court stated: *Appendix 6)

> "The court finds that the plaintiff, Bank of Montreal, either knew or reasonably should have known of the citizenship of Thorhallur G. Olafsson."

2. There is no evidence or testimony to support said finding.

3. Attached are exhibits 1 and 2, excerpts from the records of Plaintiff, made in the usual course of Plaintiff's business relating to the account of defendant Thorhallur G. Olafsson, which were delivered to counsel for Plaintiff prior to and for the purpose of filing suit herein.

4. Defendant led Plaintiff to believe he was a United States Citizen.

5. Plaintiff was given no opportunity to rebut the Court's finding.

This Objection is based on the Court's Opinion, the files and records herein, supporting affidavit and the Transcript of the hearing on Settlement of Orders, dated October 31, 1979 (and Transcript of August 15, 1979 (Appendix P 4-10)*

Dated: November 6, 1979

BURKE AND WILSON
By: /s/ W. L. BURKE (P-11419)
Attorneys for Plaintiff
1303 Mutual Bldg. 28 W. Adams
Detroit, MI 48226
Phone 961-6554

Exhibit 1 Accrued Interest

Resume and diary of Action

In October 1974 we granted this customer $10,000. operating funds to assist market full greenhouse tomato crop. Olafsson had completed the purchase of Ray Nauer farm at Belle River at cost of $200,000 with Nauer our customer taking back mortgage of $160,000. with repayment at $10,000. annually plus interest at 9%. Our loan was repaid as agreed. In February 1975 a $10,000 new loan was granted to assist bring spring greenhouse crop to market to be repaid from spring crop revenue estimated to be $90M. In May 75 Ray Nauer holder of mortgage advised us Olafsson was not a farmer and that he was in arrears on his mortgage payment. *At that time we made a notation to ensure our loan of $10M was paid and wrote that Olafsson being an American Citizen could leave for U.S. anytime and our loan resume was indicated to use caution.*

In July 1975 a loan of $15,000. was granted without obtaining fresh statement to assist complete mortgage payment of $30 M plus interest of $17M. This was to reduce mortgage to $160M the amount supposedly at closing of purchase in 1974. In October Olafsson came back and said mortgage payment had been delayed and that he would require an additional $10M which was granted and still no fresh statement taken. Loan was to be

repaid from anticipated revenue of $60M as crop was reported in excellent condition. Three weeks after reporting having excellent fall crop customer claimed he suffered damage to crop by a heavy storm. In Dec. 17/75 Olafsson reported most of greenhouse repairs had been carried out on Mary 15/76. Olafsson was granted an additional $4 to cover fuel costs and advances were to reduce from crop expected to be marketed within a few weeks.

During July and early August we noted this customer was not coming to bank. Deposits were being made through one of your Windsor branches. The previous year he called regularly with large cash deposits from roadside sales. We checked further and learned he had disposed of approximately $2M in tomatoes through one of local shippers.

EXCERPT FROM BANK OF MONTREAL RECORDS

8/75 — Mr. Roy Nauer called in today to advise T. Olafsson has only leased farm and that he is experiencing a lot of difficulty in collecting rent. He states Olafsson owes him in excess of $5M and that he is running accounts all over. He reports he is not much of a farmer as he is never on the job. He mentioned that last November one of our tellers cashed a cheque in amount of $1M payable to Belle River Green House. I may have given authority to cash the cheque as Olafsson lead us to believe he was the owner of the farm.

In any event he is indebted to us to extent of $10M due May 19/75, and we want to ensure we are paid out. A credit bureau check should be made at once. (DLM)

(hand written) caution *We understand he is an American citizen and if only leasing property he could return to U.S.* at any time.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
Filed November 6, 1979
AFFIDAVIT IN SUPPORT OF OBJECTION
TO SPECIFIC FINDING OF HONORABLE
RALPH B. GUY, JR. DISTRICT JUDGE

AFFIDAVIT IN SUPPORT OF OBJECTION
TO SPECIFIC FINDING OF HONORABLE
RALPH B. GUY, JR. DISTRICT JUDGE

State of Michigan, County of Wayne, SS.

Wilfrid L. Burke being first duly sworn deposes and says that if sworn as a witness he can competently testify to the facts set forth in the attached objection to the Specific finding of the Honorable Ralph B. Guy Jr., District Judge.

/s/ WILFRID L. BURKE

Subscribed and sworn to before me this
5th day of November, 1979
/s/ IRENE F. BURKE
Notary Public, Wayne County, Michigan
My commission expires April 25, 1983.